# United States Court of Appeals for the Second Circuit



## APPELLANT'S APPENDIX

## 74-2244

## United States Court of Appeals

For the Second Circuit

FREDERICK E. TINSLEY and ANSTALT DYNOS,

Plaintiffs-Appellees,

against

MAVALA, INC. and C. BENJAMIN DINERSTEIN, individually and doing business under the name and style of C-B SALES CO. and BENDYNE, LTD.,

Defendants-Appellants.

On Appeal from the United States District Court For the Southern District of New York

#### APPELLANTS' APPENDIX

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PROCEEDINGS

- 11-15-71 Filed Opinion #38024 by Solomon, J.—"The preliminary Injunction summarized herein shall be made permanent and Dinerstein, Bendyne, and any other company controlled or owned by Dinerstein are enjoined from manufacturing, selling, or distributing products covered by the joint venture. Tinsley is declared to be the owner of one half of all the capital stock of Mavala. Dinerstein is directed to transfer to Mavala all patent rights in the nail protector shield. However, if pltff Tinsley so elects, Dinerstein shall transf r to Tinsley an undivided one-half interest in such patent. I shall reserve the issue of atty's fees and costs. This opinion shall constitute findings of fact and conclusions of law pursuant to Rule 52 (a) Counsel for pltffs shall prepare a judgment in accordance with this opinion, which shall contain appropriate provisions for interest." Solomon J. (mailed notices)
- 1- 4-72 Filed Interlocutory Judgment Ordered that pltffs shall recover from defts on the first count of the complaint the sum of \$80,676.00 together with interest from 5-3-63. The preliminary injunction entered on 2-14-64 by Weinfeld, J. is hereby made permanent and deft C. B. Dinerstein, his agents, etc. are hereby permanently restrained, enjoined as indicated. Pltff Tinsley is declared to be the owner of one-half of all the capital stock of Mavala, Inc. Deft Dinerstein shall within 10 days transfer to pltff Tinsley an undivided one-half interest in all patent rights to the nail protector shield. Defts shall also

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#### PROCEEDINGS

produce for inspection & copying all records, etc. within 10 days. Not later than 30 days after the date of this interlocutory judgment, the parties shall advise the Court as to whether they have been able to agree upon the amounts due Mavala, Inc. If they are unable to agree, the matter shall be referred to a Special Master. The Undertaking in the amt. of \$7500. filed by pltff on 2-25-64 is hereby discharged and released. Solomon, J. Judgment entered—Clerk. m/n

- 2-10-72 Filed Pltff's Order to Show Cause ret. 2/15/72 for contempt. Bauman, J.
- 2-10-72 Filed Memorandum of law by pltffs.
- 2-15-72 Filed in Court stipulation that defts will by 2-18-72 produce certain records for inspection and copying. Pltffs' motion seking to hold defts in contempt for their failure and refusal to produce such records is adj. to 2-22-72. So Ordered—MacMahon J.
- 7-20-72 Filed Preliminary Trial Memorandum on behalf of defendants.
- 7-20-72 Filed Plaintiffs' Proposed Findings of Fact and Conclusions of Law. (filed behind Pre-Trial Order 12/23/68)
- 7-20-72 Filed Joint Pre-Trial Memorandum of Parties.
- 7-20-72 Filed transcript of Record of Proceedings of 10/26/70.

DAME	PROCERDINGS

- 7-20-72 Filed Memo. End. on Show Cause filed 2/10/72.

  Upon written consent of plaintiffs' attorneys, this motion is withdrawn without prejudice to its subsequent renewal. Gagliardi, J.
- 1- 4-73 Filed defts Affidavit & Notice of Motion for an order modifying an interlocutory judgment entered against the defts in this action on Jan 4th, 1972 as indicated.
- 1-16-73 Filed stip & order that as agreed between the parties that defts motion to modify the interlocutory judgment in this action is adjourned to Jan 30th, 1973 Gagliardi, J.
- 2-13-73 Filed pltffs Notice to take deposition of witnesses namely, Bonwit Teller, on 2-26-73, Lord & Taylor on 3-5-73 and Bloomingdales on 3-7-73.
- 3- 8-73 Filed notice of taking deposition of Bank of Commerce and American Express.
- 3-19-73 Filed Interrogatories.
- 5- 4-73 Filed Memo Endorsed on motion filed 1-4-73—Upon review of the deft's papers, we are compelled to agree with the pltff's claim that this motion is merely a "frivolous attempt \* \* \* to delay" the conclusion of this litigation. Accordingly, the motion is denied. So Ordered. Gagliardi, J. M/N
- 5- 4-73 Filed affidavit of M. C. Silberberg in opposition to pltff's motion.
- 6-6-73 Filed pltff's affidavit & notice of motion to appoint a receiver for deft. Bendyne, Ltd. ret. 6-19-73.
- 6-6-73 Filed pltff's memorandum of law in support of motion ret, 6-19-73.

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#### PROCEEDINGS

- 8-10-73 Filed Pltff's Notice of Settlement of Order. Ordered that defts C. Benjamin Dinerstein and Bendyne, Ltd. shall on or before 8/13/73 serve and file answers to interrogs propounded by pltffs. Ordered that foregoing relief is granted and directed without prejudice to remaining portions of pltffs' motion which seek an order directing appt. of a receiver for Bendyne, Ltd., etc. at any time after either 8/13/73, etc. Ward, J. (mn)
- 9-10-73 Filed Defts., Bendyne, Ltd ("Bendyne") and C. Benjamin Dinerstein ("Dinerstein") Answers and Objections to Pltffs' Interrogs.
- 3-12-74 Filed affdyt of B. Dinerstein re: opposition to pltffs' application requesting that a Receiver for Bendyne Lt be appointed pending the entry of final judgment herein.
- 3-12-74 Filed affdyt of pltff in further support of motion for appointment of a receiver.
- 3-12-74 Filed reply memorandum of law in further support of pltffs' motion for the appointment of a receiver for Bendyne, Ltd.
- 3-12-74 Filed memo of law of defts in epposition to motion for appointment of a receiver.
- 3-12-74 Filed B. Dinerstein's affdyt in opposition to appointment of a receiver.
- 3-12-74 Filed B. Dinerstein's supplemental affdyt in opposition to appointment of a receiver.
- 3-12-74 Filed Memo-End. on motion dtd 6/6/73. Motion for appointment of a receiver is granted. Gagliardi, J. mn

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#### PROCEEDINGS

- 3-14-74 Filed Order appointing Otto C. Jaeger receiver of the deft, Bendyne, Ltd. and of all the properties of the said deft, real and personal, of whatever kind, etc. that said receiver forthwith file with the clerk of this court a bond in the sum of \$250.00, etc. Gagliardi, J. mn
- 3-19-74 Filed defts' notice of appeal from order of 3/14/74. Mailed copies to Clerk & atty for pltffs.
- 8-28-74 Filed Order that the order of 3/14/74 is withdraws and that Michael Devine is appointed receiver of the deft., Bendyne, Ltd. to the extent and with the limited powers necessary to supervise and ensure the maintenance of accurate books and records of the corp. and the preparation of reports to the Court as more particularly provided below, etc. that the receiver file with the Clerk a bond in the sum of \$250, etc. Gagliardi, J.
- 9-10-74 Filed defts C. B. Dinerstein and Bendyne, Ltd., notice of appeal from order dated 7/31/74 and docketed 8/29/74 Mailed copies to M. Stanton, Golenbock and Barell, M. Devine.
- 9-10-74 Filed Receiver's Bond in the sum of \$250. by the Fireman's Fund.
- 11-22-74 Filed true copy of order of the USCA that the appeal from the judgment of the U.S.I C. for the S.D.N.Y. is dismissed. Clerk mn

#### Opinion of Judge Solomon After Trial Dated November 11, 1971

#### UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Solomon, Judge

Frederick Tinsley, a British citizen, and Anstalt Dynos, S.A., Tinsley's Lichtenstein corporation (Dynos), filed an action against defendant Benjamin Dinerstein, Bendyne, Ltd. and C-B Sales Co., two of Dinerstein's companies, and Mavala Inc., a New York corporation in which Tinsley and Dinerstein were each 50 per cent Shareholders (Mavala).

In their first cause of action, plaintiffs claim \$80,676.00

for goods sold and delivered by Dynos to Mavala.

In another cause of action, plaintiffs claim that Dinerstein wrongfully appropriated patent rights to a product that was invented for Mavala while Dinerstein was president of Mavala. Plaintiffs seek an accounting and equitable relief. Plaintiffs assert that Tinsley and Dinerstein were joint venturers in Mavala and that Dinerstein violated his fiduciary duty to Tinsley by appropriating the patent rights for himself through his own companies instead of for Mavala.

Tinsley owned Dynos, a cosmetic manufacturing company which sold its products throughout Europe under the name "Mavala." In January, 1962, Tinsley came to New York and met with Dinerstein. They agreed to form a New York corporation to market Dynos cosmetic products in the United States.

In April, 1962, Mavala was formed with Dinerstein as its president. Tinsley and Dinerstein orally agreed that

Mavala would be the sole United States distributor of "Chatton", a cosmetic eyeliner, and "Scientifique", a formaldehyde pase fingernail hardener. They also agreed that they would divide Mavala profits equally.

Shortly thereafter, Mavala began to distribute "Chatton". Towever, the Food and Drug Administration (FDA) would not approve "Scientifique" because it feared that the formaldehyde base might damage the cuticles and soft tissue of a user. Dynos had sold "Scientifique" in Europe with a grease protector in each box, but the FDA rejected this protector as ineffective.

In late 1962, Mavala, acting through Dinerstein, hired Foster D. Snell, Inc. (Snell), a patent consulting firm, to get "Scientifique" approved for distribution in the United States. Snell was paid with Mavala funds. Snell and Dinerstein invented an adhesive backed foil shield which, when applied over the end of a user's finger, protected the cuticle. In January, 1963, Dinerstein applied for a patent for the shield in his own name.

In February, 1963, Tinsley was informed by Dinerstein that he personally owned all the patent rights to the shield. Dinerstein claimed the exclusive right to use the shield in the United States for his own nail product, but offered to sell Tinsley the right to use the shield in Europe. Tinsley refused. He claimed that the shield belonged to Mavala.

After plaintiffs filed this action, Dinerstein formed Bendyne, Ltd. (Bendyne), a Delaware corporation, and began to distribute a nail hardener like "Scientifique" under the name "Living Nail". The FDA approved the sale of "Living Nail" if each box contained a set of the shields. "Scientifique" has never been distributed in the United States.

Plaintiffs in their first cause of action allege that Dynos sold and delivered \$101,160.00 worth of "Chatton" eyeliner to Mavala based upon a unit price of 75¢. Mavada \$20,484.00 on account, and plaintiffs claim a base of

\$80,676.00. Defendants contend that the agreement between Tinsley and Dinerstein fixed the price for "Chatton" at 50¢ per unit rather than the 75¢ unit price which appears on the Dynos invoices to Mavala.

Defendants offered no evidence that the price of "Chatton" was other than the invoice price, and at the conclusion of the trial I found that plaintiffs were entitled to a

judgment for \$80,676.00 on this count

Defendants contend that this action should be dismissed because Madame van Landeghem is an indispensable party. The evidence showed that Tinsley was a partner in Dynos with Madame van Landeghem. In a written instrument dated February 10, 1967, she assigned all rights in this litigation to Tinsley. There is no merit in defendants' contention that Madame van Landeghem is a necessary party to this action.

In another count Tinsley claims that Dinerstein breached his fiduciary duty to Tinsley by claiming the patent rights to the foil shield.

Dinerstein was president of Mavala when he and Snell were working together to develop the foil shield. This shield or a similar device was essential for FDA approval so that Mavala could market "Scientifique" in the United States. Dinerstein referred to his efforts to invent a device to get FDA approval for "Scientifique" in several letters to Tinsley. These letters show that Dinerstein and Snell were working for Mavala and not for Dinerstein individually.

I find that Dinerstein, in disregard to his fiduciary obligations to Mavala and in disregard of his joint venture obligations to Tinsley, diverted to himself not only the patent rights, but also the profits which would have accrued from the sale of "Scientifique" in the United States. A fiduciary may not appropriate to himself property which he holds in trust.

Defendants contend that Tinsley and Dinerstein were not joint venturers once Mavala was incorporated. Defendants contend that under New York law persons may not claim joint venturer status once they elect to carry on a business through a corporation. If this were true, Tinsley would have no individual claim for damages against Dinerstein, but plaintiffs could only recover on a derivative action on behalf of Mavala.

Plaintiffs here assert that they have made such a claim. I do not reach the issue of whether the pleading here make out a derivative claim on behalf of Mavala because I find that New York law permits Tinsley to recover against Dinerstein as a joint venturer.

Defendants contend that under Weisman v. Awnair Corporation of America, 3 N.Y.2d 444, 144 N.E.2d 415 (1957), Tinsley may not obtain individual relief against Dinerstein as a joint venturer. In Weisman, the New York Court of Appeals, by a divided court, denied plaintiff equitable relief when the parties had chosen to distribute their products through a corporation. Judge Conway, speaking for the majority, said:

"\* \* \* the rule is well settled that a joint venture may not be carried on by individuals through a corporate form." 144 N.E.2d at 418.

The rule has been criticized by many legal scholars, and it has been criticized, limited or rejected in numerous cases in both state and federal courts.

In Arditi v. Dubitzky, 354 F.2d 483 (2d Cir. 1965), the plaintiff, a New York commodity dealer, was invited by defendant, a Connecticut builder, to finance and to become a partner with him in a high rise building project in New Jersey. They formed a corporation in which each of them was an equal shareholder. The enterprise failed, and plaintiff sued. He claimed that defendant had violated his fidu-

ciary obligation to the plaintiff by obstructing the project and by misrepresenting his skill as a builder. The Court of Appeals reversed a summary judgment in favor of the defendant. Judge Leonard Moore, speaking for the Court, stated:

"The district court based its decision entirely upon the assumption that it was the law of both New York and New Jersey that whatever rights the parties may have had under their joint venture agreement, 'the rights under it were merged into the corporations at the time they were organized' and hence no longer existed. Reliance for this principle is placed primarily upon Jackson v. Hooper, 76 N.J. Eq. 592, 75 A. 568, 27 L.R.A., N.S., 658 (Ct. Err. & App. 1910) for New Jersey and Weisman v. Awnair Corp. of America, 3 N.Y.2d 444, 165 N.Y.S.2d 745, 144 N.E.2d 415 (1957) for New York.

"In New York, early cases had applied the rule of Jackson v. Hooper without question \* \* \*. In the most recent full discussion of the question by the Court of Appeals, in Weisman v. Awnair Corp. of America, supra, the court repeated the rationale of Jackson v. Hooper in broad terms." 354 F.2d at 485-86.

#### Judge Moore continued:

"The rule of Jackson v. Hooper has come under heavy attack and has been rejected by many jurisdictions. See Conway, The New York Fiduciary Concept in Incorporated Partnerships and Joint Ventures, 30 Fordham L.Rev. 297 (1961); Note, Joint Venture Corporations: Drafting the Corporate Papers, 78 Harv.L.Rev. 393, 397-98 (1964); Note,

Corporations: Does a Joint Adventure Agreement to Use the Corporation as a Medium Survive Incorporation? 44 Calif.L.Rev. 590 (1956). little logical reason why individuals cannot be 'partners inter sese and a corporation as to the rest of the world, so long as the rights of third parties such as creditors are not involved. See, e.g., De Boy v. Harris, 207 Md. 212, 113 A.2d 903 (1955); Delaney, The Corporate Director; Can His Hands Be Tied in Advance, 50 Colum.L.Rev. 52 (1950). The courts of New York and New Jersey have come to recognize this trend, at least to the extent of permitting suit upon joint venture obligations if it is apparent that the intention of the parties was that the corporation should be only a means of carrying out the joint venture-a conduct of title, as in Macklom, or a way of organizing different branches of a wide-reaching joint enterprise, as in Fortugno." 354 F.2d at 486-87.

Defendants cite Noto v. Cia Secula di Armanento, (S.D. N.Y. 1970) 310 F.Supp. 639, to show that Judge Edward Weinfeld agrees that New York law still follows the Weisman rule. Judge Weinfeld did apply the Weisman rule in Noto, but in Noto the survivors of persons killed in a tanker collision in Iran attempted to hold stockholders in a corporation individually liable as joint venturers. This situation is not included in the Arditi limitation. Judge Weinfeld in a note to his discussion of the Weisman rule said:

"The Court is aware that in Arditi v. Dubitzky, 354 F.2d 483 (2d Cir. 1965), the Court of Appeals interpreted certain later New York cases as limiting the Weisman holdings. However, Arditi dealt solely with the relationship of the joint venturers among

themselves. As the Court of Appeals commented: 'There is little logical reason why individuals cannot be 'partners inter sese and a corporation as to the rest of the world,' as long as the rights of third parties such as creditors are not involved.' 354 F.2d at 486. Here plaintiffs are such third parties, and the Arditi modification of Weisman is inapplicable." 310 F.Supp. at 646 (n. 18).

I find that New York law permits Tinsley to recover individually for breach of the fiduciary duty that Dinerstein owed him.

Judge Weinfeld issued a preliminary injunction in this case, which is reported in 226 F.Supp. 477. In it, Judge Weinfeld:

- (1) enjoined Dinerstein and Bendyne from transferring any claimed right to the patent application or patent for a nail protector shield;
- (2) directed Dinerstein to keep accurate records of all sales by Bendyne of "Living Nail", which used the shield protector; and
- (3) enjoined Dinerstein from revealing the formula obtained from plaintiffs for Mavala's "Scientifique" and from revealing trade secrets and sales information of Mavala.

The preliminary injunction summarized above shall be made permanent, and Dinerstein, Bendyne, and any other company controlled or owned by Dinerstein are enjoined from manufacturing, selling or distributing products covered by the joint venture.

Tinsley is declared to be the owner of one-half of all the capital stock of Mavala. Dinerstein is directed to transfer to Mavala all patent rights in the nail protector shield.

However, if plaintiff Tinsley so elects, Dinerstein shall transfer to Tinsley an undivided one-half interest in such patent.

Dinerstein and Bendyne shall pay Mavala the amounts found to be due on the accounting of the profits from the sale of "Scientifique" and "Living Nail" and any similar product. In determining net profits, no salary or other compensation shall be deducted for services performed by Dinerstein or by any member of his family. If Tinsley so elects, Dinerstein and Bendyne shall pay one-half of the amount found to be due to Tinsley for his own account.

If the parties are unable to agree upon the amounts due within 30 days, I shall refer that issue to a Special Master.

I shall reserve the issue of attorneys' fees and costs.

This opinion shall constitute findings of fact and conclusions of law pursuant to Rule 52(a), Fed. R. Civ. P.

Counsel for plaintiffs shall prepare a judgment in accordance with this opinion, which shall contain appropriate provisions for interest.

Dated: November 11, 1971.

Gus J. Solomon United States District Judge

#### Interlocutory Judgment Entered January 4, 1972

#### UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

This cause having been considered by this Court upon the pleadings and evidence presented on trial and upon briefs of counsel for the parties and upon the findings of fact and conclusions of law set forth in the opinion filed in this Court on November 11, 1971, it is hereby

ORDERED, ADJUDGED AND DECREED as follows:

- 1. Plaintiffs shall recover from defendants on the first count of the complaint the sum of \$80,676.00 together with interest from May 3, 1963.
- 2. The preliminary injunction entered by District Judge Edward Weinfeld on February 14, 1964 is hereby made permanent and defendant C. Benjamin Dinerstein, his agents, servants, employees and attorneys and all persons in active concert and participation with him are hereby permanently restrained and enjoined from directly or indirectly transferring any claimed right or any interest in and to the patent and pencing patent application for the nail protector shield, or abandoning, suffering or consenting to any loss of rights or diminution of value in the said patent and pending patent application, to any person, firm or corporation, and from permitting Bendyne, Ltd. to do any of the foregoing and are further permanently restrained and enjoined from directly or indirectly revealing to any person, firm or corporation the formula or its com-

#### Interlocutory Judgment

ponent parts, obtained from plaintiffs for Mavala "Scientifique" and they and each of them are restrained from directly or indirectly revealing to any person, firm or corporation, any trade secrets and sales information derived or obtained by reason of defendants' relationship to the plaintiffs and interest in defendant Mavala, Inc.;

- 3. Plaintiff Tinsley is declared to be the owner of one-half of all the capital stock of Mavala, Inc.;
- 4. Defendant Dinerstein shall within 10 days after the date of this interlocutory judgment transfer to plaintiff Tinsley an undivided one-half interest in all patent rights to the nail protector shield.
- 5. Defendants shall within 10 days after the date of this interlocutory judgment, produce for inspection and copying by plaintiffs, all records and accounts for sales of the product "Living Nail" and the shield protector and all income derived from such sales, which records they were required to maintain pursuant to the order of District Judge Edward Weinfeld dated February 14, 1964. Within 5 days thereafter, the attorneys for plaintiffs and defendants shall commence meetings for the purpose of determining and agreeing upon the amount of profits due Mavala, Inc. from the sale of "Scientifique" and "Living Nail". In determining net profits, no salary or other compensation shall be deducted for services performed by defendant Dinerstein or any member of his family. Not later than 30 days after the date of this interlocutory judgment, the parties shall advise the Court as to whether they have been able to agree upon the amounts due Mavala, Inc. If they are unable to agree, the matter shall be referred to a Special Master.

#### Interlocutory Judgment

- 6. Within 30 days after entry of a final judgment in this action, defendants shall pay to Mavala, Inc. all sums found to be due pursuant to paragraph 5 above with interest from May 3, 1963. Prior to such time, plaintiff Tinsley may by written notice to defendants elect to receive one-half of such sum in which case, payment of one-half the sum shall be made directly to him.
- 7. The undertaking in the amount of \$7500 filed by plaintiff on February 25, 1964 is hereby discharged and released.
- 8. The issue of the award of attorneys fees and costs to plaintiffs is reserved for determination at the settlement of a final judgment.
- 9. Jurisdiction of this action is retained for the purpose of making any further orders to carry into effect this interlocutory judgment and to determine the amount of profits to be paid to Mavala, Inc. or plaintiff Tinsley, and the amount of attorneys fees and costs, if any, to be paid to plaintiffs, and any further orders necessary or proper to be made to effect a final adjustment and settlement of this controversy between plaintiffs and defendants.

Gus J. Solomon U.S.D.J.

Judgment Entered 1/4/72 John Livingston

#### Order to Show Cause Dated February 10, 1972

#### UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Upon reading the annexed affidavit of Leonard W. Wagman, sworn to on the 9th day of February, 1972, and upon the pleadings and proceedings previously had herein.

Let defendants C. Benjamin Dinerstein and Bendyne, Ltd. show cause in Room 506 in the United States Courthouse, Foley Square, New York, New York, on the 15th day of February, 1972 at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard why an order pursuant to Local Civil Rule 14 should not be made herein:

- (a) adjudging the said defendants in contempt of this Court for their refusal to comply with and carry out the provisions of the interlocutory judgment;
- (b) fining defendants \$500 per day for each day that defendants continue in default with the terms of said judgment;
- (c) granting plaintiffs reasonable costs and attorneys fees necessitated by the instant application; and
- (d) for such other and further relief as to the Court may seem just and proper.

It is further ordered that service of a copy of this order and annexed affidavit, on the said defendants, on or before February 10, 1972, 4 P.M. shall be sufficient service.

Dated: February 10th, 1972 New York, N.Y.

> s/ Arnold Bauman U.S.D.J.

#### Affidavit of Leonard W. Wagman in Support of Foregoing Motion

#### UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

State of New York ) County of New York ) ss.:

LEONARD W. WAGMAN, being duly sworn, deposes and says:

- 1. I am a member of the firm of Golenbock and Barell, attorneys for plaintiffs herein. I submit this affidavit in support of plaintiffs' motion pursuant to Rule 14 of the Civil Rules of the Court for an order holding the defendants C. Benjamin Dinerstein and Bendyne, Ltd. in contempt of this Court on the grounds that they have wilfully and knowingly failed and refused to comply with the provisions of the interlocutory judgment of this Court entered January 4, 1972, requiring them to produce certain records for inspection and copying within ten days after the entry of the judgment. (A copy of the judgment is annexed as Exhibit A).
- 2. The judgment was entered, in accordance with an opinion filed after trial of this action by the Honorable Gus J. Solomon, Chief Judge, District of Oregon, sitting by designation. In his opinion, Judge Solomon sustained plaintiff Frederick Tinsley's claim against defendants C. Benjamin Dinerstein, and Bendyne, Ltd., and C-B Sales Co., for an accounting of profits from the sale of cosmetic products known as "Scientifique" and "Living Nail." He

also awarded plaintiffs Tinsley and Anstalt Dynos judgment against defendants in the amount of \$80,676.00 for goods sold and delivered.

#### I.

#### Prior Proceedings

- 23. This action was commenced on May 3, 1963 by Frederick Tinsley ("Tinsley"), a British citizen, and Anstalt Dynos, S. A. ("Dynos") Tinsley's Lichtenstein corporation against defendant C. Benjamin Dinerstein, Bendyne Ltd., ("Bendyne") and C-B Sales Co., ("C-B Sales") two of Dinerstein's companies and Mavala, Inc. ("Mavala"), a New York corporation which was formed by Tinsley and Dinerstein to carry out their joint venture to market cosmetic products in the United States and in which each held a 50% stock interest.
- 4. The complaint alleged that Dinerstein, in breach of his fiduciary duties arising out of the joint venture wrongfully appropriated for himself and his own companies, the patent right to a nail protector shield which was developed for Mavala so that it could secure the approval of the Food and Drug Administration to distribute a nail hardening product known as "Scientifique" in the United States. The complaint was subsequently amended to include an allegation that Dinerstein was distributing a nail hardener similar in substance to "Scientifique" under the name "Living Nail" through his corporation Bendyne and that he had applied for a patent on the nail protector shield in his own name. Tinsley sought an accounting from defendants of profits from the sale of "Scientifique" and "Living Nail" and an injunction against the transfer of any interest in the patent application or against revealing the formula or its component parts to any person. Tinsley

and Dynos also asserted a claim for \$80,676,00 for goods sold and delivered to Mavala.

- 5. Subsequently, plaintiffs moved before District Judge Edward Weinfeld for a preliminary injunction. On January 30, 1964, Judge Weinfeld granted plaintiffs injunctive relief as follows:
  - (a) enjoining Dinerstein during the pendency of the action from transferring any claimed right in and to the patent application for the nail protector shield to any person, firm or corporation;
  - (b) directing Dinerstein "to require Bendyne, Ltd. to keep accurate accounts and records of all sales of "Living Nail" and all income derived from such sales \* \* \* kept in sufficient form to permit a ready accounting of all such transactions;
  - (c) restraining Dinerstein from revealing to any person, firm or corporation the formula, or its component parts, obtained from plaintiffs for "Scientifique."
- 6. After trial of the action, District Judge Solomon sustained Tinsley's claim for an accounting by defendants, finding that the nail protector had been developed for Mavala and that Dinerstein in disregard of his fiduciary obligations to Mavala and in disregard of his joint venture obligations to Tinsley, had direvted to himself the patent rights and profits which would be accrued from the sales of "Scientifique" in the United States. Additionally, Judge Solomon awarded plaintiffs judgment for \$80,670.00 on its claim for goods sold and delivered.
- 7. In accordance with the Court's decision, an interlocutory judgment was entered on January 4, 1972, which contained the following provisions:

- (a) Plaintiffs were awarded on \$80,676.00 together with the interest from May 3, 1963;
- (b) the preliminary injunction granted by Judge Weinfeld was made permanent and Dinerstein, Bendyne, and any other company controlled or owned by Dinerstein was enjoined from manufacturing, selling or distributing products covered by the joint venture;
- (c) Defendants Dinerstein and Bendyne were ordered to pay Mavala the amounts found to be due on the accounting of the profits from the sale of "Scientifique" and "Living Nail" and any similar product.

In connection with the accounting, paragraph "5" of the Judgment provided that:

- "5. Defendants shall within ten days after the date of this interlocutory judgment, produce for inspection and copying by plaintiffs, all records and accounts for sales of the product 'Living Nail' and the shield protector and all income derived from such sales, which records they were required to maintain pursuant to the order of District Judge Edward Weinfeld dated February 14, 1964."
- 8. By letter dated December 28, 1971 (Exhibit B) Michael Stanton, Esq., defendants' counsel, applied to Judge Solomon for a stay of the proposed judgment pending appeal. This application was denied by Judge Solomon in a letter dated December 31, 1971 (Exhibit C). Judge Solomon's letter informed counsel for the respective parties that he had signed the interlocutory judgment submitted by plaintiffs' counsel.

9. Judge Solomon filed the judgment on January 4, 1972 and therefore, the time for defendants Dinerstein and Bendyne to produce the records pursuant to paragraph 5 expired on January 14, 1972.

#### II.

### Efforts to obtain voluntary compliance with the Court's order

- 10. On January 13, 1972, prior to the expiration of the ten-day period for production of these records, my associate, Michael Silberberg, telephoned Mr. Stanton in order to ascertain whether defendants Dinerstein and Bendyne would produce the records on schedule. Mr. Stanton advised Mr. Silberberg that he would determine whether any of the records were available for production and would telephone the following day with his answer. This telephone call was never returned, nor were two subsequent telephone calls made on January 17, 1972. On January 18, 1972, a letter was hand delivered to Mr. Stanton advising defendants of their default in complying with the provisions of paragraph "5" of the interlocutory judgment and further advising them that unless the records specified were produced on or before Friday, January 21, plaintiffs would have no alternative but to seek appropriate sanctions from the Court. (A copy of this letter is annexed hereto as Exhibit D.)
- 11. Defendants did not respond to this letter until January 28, 1972. At that time, Mr. Stanton wrote and merely offered to produce Bendyne's income tax returns for plaintiff's inspection. The letter made no reference to the books of account and records of sales which Judge Weinfeld had ordered Bendyne to maintain in 1964 "in sufficient form

to permit a ready accounting" and which defendants Dinerstein and Bendyne were required to produce by the clear and unambiguous language of paragraph 5. (A copy of this letter is annexed hereto as Exhibit E.)

12. On February 1, 1972, I informed Mr. Stanton by hand delivered letter, that while I welcomed the opportunity to examine these income tax returns, production of such a limited category of documentation clearly failed to comport with the provisions of paragraph 5 of the interlocutory judgment. I further advised Mr. Stanton that unless the required records were produced by the close of business on Friday, February 4, 1972, plaintiff would promptly seek an order holding defendants in contempt of Court. To date, there has been no response from defendants and the required records have not been produced. (A copy of this letter is annexed hereto as Exhibit F.)

#### III.

#### The Relief Sought

- 13. In this motion, plaintiffs seek an order: (a) adjudging defendants Dinerstein and Bendyne to be in contempt of Court for their wilful and deliberate failure and refusal to comply with the provisions of paragraph 5 of the interlocutory judgment; and (b) imposing a fine of \$500 a day until such records are produced, together with the costs incurred in bringing this motion including the award of reasonable attorneys fees.
- 14. The need for such relief is evident from the foregoing. Defendants Dinerstein and Bendyne have wilfully and knowingly failed and refused to produce the required records and are attempting through such action to obtain

a stay of the accounting notwithstanding Judge Solomon's denial of their request for a stay. Moreover, it is clear that they will continue in this course of contumacious conduct unless sanctions are imposed by this Court.

- 15. As demonstrated in the annexed memorandum of law, this Court may compel obedience to its orders and judgments through the exercise of its power to punish for contempt. As part of the contempt sanctions available to it, this Court may impose monetary fines both to enforce compliance with the judgment and to compensate Tinsley for damage incurred by reason of defendants' contumacious conduct. Clearly, such fines are warranted in this action.
- 16. While the exact figures are unavailable to plaintiff until accounting has been rendered, I am informed by plaintiff Tinsley that based upon an investigation conducted by him and upon his knowledge and expertise in the cosmetic industry, he believes Bendyne's profits from the sale of "Living Nail" to have exceeded \$200,000 per year. Accumulated over a 9 year period of this litigation, defendants Dinerstein and Bendyne therefore have received nearly \$2,000,000 from such sales. Under the terms of the decree, Tinsley is entitled to 50% of this sum.
- 17. Based on the above figures, Tinsley is being deprived of at least \$500 a day in profits from the sale of "Living Nail" for each day defendants Dinerstein and Bendyne continue in their refusal to proceed with the accounting. Thus, the imposition of a daily fine in this amount until the specified records are produced is reasonable and warranted both to insure the defendants' compliance with the Court's order and to compensate Tinsley for his loss. Additionally, plaintiff should be awarded his attorneys fees and the costs occasioned by the instant motion.

It is for the foregoing reason that plaintiff has moved by order to show cause for which no previous application has been made.

18. Accordingly, it is respectfully requested that plaintiff's motion be granted in all respects.

Leonard W. Wagman

(Sworn to February 9, 1972.)

#### Exhibit A Annexed to Affidavit of L. W. Wagman Interlocutory Judgment Entered January 4, 1972

(Same as Interlocutory Judgment printed herein at page 14a.)

#### Exhibit B Annexed to Affidavit of L. W. Wagman Letter Dated December 28, 1971

WEIL, GOTSHAL & MANGES 767 FIFTH AVENUE NEW YORK, N. Y. 10022

December 28, 1971

Hon. Gus J. Solomon Chief Judge United States District Court Portland, Oregon 97205

Re: Tinsley v. Mavala, Inc.

Dear Judge Solomon:

This letter is being written in support of the defendants' application for a stay of a portion of the judgment submitted on their behalf.

It is respectfully submitted to the Court that certain of the findings of fact and conclusions of law incorporated in the opinion of November 11, 1971 are inconsistent with the record and are not supported by the weight of the evidence.

It is submitted that the testimony does not support a finding that Snell and Dinerstein invented an adhesive backed shield. The testimony of Dinerstein and Cyril Kimball, former president of Snell, is in complete accord to the effect that Dinerstein alone designed said shield, which was the subject of a patent application filed in the United States Patent Office by Dinerstein on February 5, 1963; moreover, said patent application was the subject of an official rejection by the United States Patent Office in April of 1964 for lack of patentable subject matter. Similarly there was no support in the record for the finding at Page 3 of the

#### Exhibit B Annexed to Affidavit of L. W. Wagman

opinion that Dinerstein offered to sell Tinsley the right to use the shield in Europe. At all times Dinerstein claimed exclusive right to said shield.

It is submitted that chemical analyses offered in evidence at the trial and the testimony of Mr. Kimball demonstrated that the formulas for the products "Scientifique" and "Living Nail" are dissimilar both from a quantitative and qualitative point of view. At trial, plaintiffs did not offer any evidence to establish any similarity of the formulations. We believe that any such proof would have been impossible in view of the results reached by the testing procedures. In addition, the formula of "Scientifique" is the subject of a patent which renders it unique and therefore dissimilar from any other formula. Further, the formulation of "Living Nail" was in the public domain since March, 1958; i.e., before the time Dinerstein commenced its use, as evidenced by the prosecution file history of plaintiffs' own United States patent.

In addition, the finding that "Scientifique" has never been distributed in the United States, is contrary to fact since it has been sold through several American distributors from March 30, 1964 to date. References to such distributors and ads concerning the sale of "Scientifique" are the subject of several exhibits in the depositions. Further, plaintiffs' patent counsel has confirmed the sale in department stores throughout the United States since March 30, Such facts are confirmed in the affidavits of Alvin Browdy, Esq., patent counsel to Madam Vanlandeghem, where he confirmed the United States Patent Office that "Scientifique" had been imported into the United States since March 30, 1964, and had been sold in department stores from coast to coast, without any steps having been taken by the Food and Drug Administration to cause the removal of this product from the market.

#### Exhibit B Annexed to Affidavit of L. W. Wagman

In view of the contents of the post trial memorandum submitted to the Court on behalf of the defendants, and in view of our letters to your Honor of October 13, 1971 and November 3, 1971, we do not intend to set out at length again our position on the unique and far reaching legal conclusion that your Honor has reached, which we sincerely believe goes beyond the scope of any opinion rendered by the Court of Appeals of the State of New York.

Thank you for your consideration regarding these

points.

#### Respectfully submitted.

Michael K. Stanton For Weil, Gotshal & Manges

MKS:GLT Air Mail Special Delivery

#### Copies to:

Leonard A. Wagman, Esq. Golenbock and Barell, Esqs. 60 East 42nd Street New York, New York 10017

Mr. John Livingston Clerk of the Court United States District Court United States Courthouse Foley Square New York, New York 10007

# Exhibit C Annexed to Affidavit of L. W. Wagman Letter Dated December 31, 1971

[LETTERHEAD OF]

# UNITED STATES DISTRICT COURT DISTRICT OF OREGON Portland, Oregon 97205

December 31, 1971

Mr. Leonard W. Wagman, Golenbock and Barell, 60 East 42nd Street, New York, N. Y. 10017.

Mr. Michael K. Stanton, Weil, Gotshal & Manges, 767 Fifth Avenue, New York, N. Y. 10022.

Gentlemen:

Re: Frederick E. Tinsley, et al. v. Mavala, Inc., et al., (S.D. N.Y.) 63 Civil 1298

I checked the proposed judgment, which Mr. Stanton mailed me, with the interlocutory judgment submitted by Mr. Wagman. I have signed and mailed to the Clerk of the Court the interlocutory judgment submitted by Mr. Wagman.

I am sympathetic with Mr. Stanton's desire to appeal a portion of the judgment at the earliest possible date and to stay execution of that portion, but that should not cause any problem even under the interlocutory judgment. I had considered making the recitals and entering the judgment in accordance with Rule 54(b), Federal Rules of Civil Procedure, but I believe it is not appropriate.

# Exhibit C Annexed to Affidavit of L. W. Wagman

I will ask Mr. Wagman not to attempt to reach the patent rights to the nail protector shield, which I had ordered Dinerstein to transfer, until at least 30 days after a final judgment shall have been entered. This will enable Mr. Stanton to appeal this portion of the judgment.

I do not make any suggestions for Paragraphs 5 and 6 because those amounts will not be due until 30 days after

the final judgment.

Mr. Stanton in his letter of December 28th complains that "the testimony does not support a finding that Snell and Dinerstein invented an adhesive backed shield." Even if that were true, it would not alter the result because the clear implication of my finding is that Mr. Dinerstein appropriated for himself, in violation of his fiduciary duty, a corporate opportunity. If Mr. Wagman believes it is necessary, I am willing to file additional findings to cover that point specifically.

Nothing in this letter is meant to prevent Mr. Wagman from attempting to collect the judgment granted the plain-

tiffs in Paragraph 1.

Mr. Wagman, in Paragraph 6 of the proposed judgment, referred to Paragraph 4. I believe he meant Paragraph 5,

and I have made that change.

I will be in Miami, Florida, from January 3rd to January 7th, and you can reach me at the United States Court House there. I will be occupying Chambers No. 201. Beginning on January 10th, for a period of one month, I will be in Tampa, and you can reach me through the United States Court House there.

I have returned the file and all of the exhibits to Mr. John Livingston, Clerk of the Court.

Very truly yours,

/s/ Gus J. Solomon Gus J. Solomon

cc: Mr. John Livingston

# Exhibit D Annexed to Affidavit of L. W. Wagman Letter Dated January 18, 1972

By hand

Michael K. Stanton, Esq. c/o Weil, Gotshal and Manges 767 Fifth Avenue New York, New York 10022

Re: Tinsley v. Mavala, Inc.

Dear Mr. Stanton:

We are writing to advise you that defendants are in default of the provision of paragraph five of the interlocutory judgment filed in the above captioned action on January 4, 1972. That paragraph in pertinent part provides:

"5. Defendants shall within ten days after the date of this interlocutory judgment, produce for inspection and copying by plaintiffs, all records and accounts for sales of the product "Living Nail" and the shield protector and all income derived from such sales, which records they were required to maintain pursuant to the order of District Judge Edward Weinfeld dated February 14, 1964."

The time for defendants to produce the records specified in paragraph five expired on January 14, 1972. Prior to that time, on January 13, 1972, I called you to ascertain whether the records were to be produced on schedule. At that time, you advised me that you would check and call me the following day. You did not call me on January 14, 1972 as agreed nor have you returned two subsequent telephone calls which I made to you on January 17, 1972.

# Exhibit D Annexed to Affidavit of L. W. Wagman

We are, therefore, advising you that unless all records specified in paragraph five are produced on or before Friday, January 21, 1972, we will seek appropriate sanctions from the Court.

Very truly yours,

Michael C. Silberberg

MCS/ai

ce: Hon. Gus J. Solomon, Chief Judge U.S. District Court Portland, Oregon 97205

# Exhibit E Annexed to Affidavit of L. W. Wagman Letter Dated January 28, 1972

[LETTERHEAD OF]

WEIL, GOTSHAL & MANGES 767 Fifth Avenue New York, N.Y. 10022

January 28, 1972

Leonard W. Wagman, Esq. Golenbock & Barell 60 East 42nd Street New York, N.Y. 10017

Re: Tinsley et al. v. Mavala et al.

Dear Leonard:

In order to attempt to arrive at the profits of Bendyne Ltd., I have arranged to have delivered to me photocopies of all income tax returns from the inception through the most recent filing. These returns will be available for examination by you or other authorized representatives of the plaintiff at such time as you deem appropriate. Please be good enough to call in advance in order for me to arrange to be present.

I regret the delay in this connection, but I have had some difficulties in obtaining this information.

Sincerely yours,

Mike Michael K. Stanton

MKS:ct

# Exhibit F Annexed to Affidavit of L. W. Wagman Letter Dated February 1, 1972

February 1, 1972

By HAND

Mr. Michael K. Stanton, Esq. Weil, Gotshal & Manges 767 Fifth Avenue New York, New York 10022

Re: Tinsley et al. v. Mavala et al.

Dear Mr. Stanton:

I am in receipt of your letter of January 28, 1972 in which you advise me that defendants are willing to allow plaintiff to inspect the income tax-returns of defendant Bendyne Ltd.

While I would welcome the opportunity to examine these income tax returns, it is patently clear that the production of such a limited category of records is not compliance with the provisions of paragraph 5 of Judge Solomon's order which requires defendants to have produced by January 14, 1972 "all records and accounts for sales of the product 'Living Nail' and the shield protector of all income derived from such sales \* \* \*"

Defendants have of course, been given ample opportunity to produce the records required by Judge Solomon's order and have been in default for a period of 18 days. Despite our letter of January 18, 1972 in which we advised you of defendants' default and notified you of our intention to seek appropriate relief from the Court if the records were not produced by January 21, 1972, such records have not been produced to date and you have now notified us of your intention to produce only a limited segment of

# Exhibit F Annexed to Affidavit of L. W. Wagman

what is required. Your protestations that you have encountered "some difficulties" in obtaining the records are somewhat surprising in light of the fact that defendants have, since February 4, 1964, been subject to an order of the United States District Court requiring them to maintain these records.

Defendants will be given one last opportunity to produce all of the records specified. If they are not produced by the close of business on Friday, February 4, 1972, we will promptly seek an order holding them in contempt of court.

Very truly yours,

Leonard W. Wagman

LWW/au cc: Mr. Fred E. Tinsley

# Letter from Michael C. Silberberg to Judge Gagliardi Dated August 28, 1972 in Support of Foregoing Motion

[LETTERHEAD OF]

GOLENBOCK AND BARELL 60 East 42nd Street New York, N.Y. 10017

August 28, 1972

The Honorable Lee Gagliardi United States District Court Southern District of New York U.S. Court House Foley Square New York, New York 10007

> Re: Tinsley v. Mavala (63 Civ 1298)

Dear Judge Gagliardi:

We are the attorneys for plaintiffs in the above referenced action which has, since entry of an interlocutory judgment on January 4, 1972, been assigned to you for all purposes. We are writing to request a conference with the Court to resolve problems which have impeded the post-judgment accounting proceeding.

The action has been pending for more than nine years and was tried in 1970 by District Judge Gus J. Solomon, Chief Judge of the District of Oregon. In his opinion rendered after trial, Judge Solomon sustained plaintiffs' claims that defendant Dinerstein had breached fiduciary duties arising out of a joint venture with plaintiff Tinsley to market cosmetic products in the United States. He found that Dinerstein had wrongfully appropriated for himself and his wholly-owned company, defendant Bendyne Ltd.,

# Letter from Michael C. Silberberg

the patent rights to a nail protector shield which was developed for their jointly-owned corporation Mavala in order for Mavala to secure the approval of the Food and Drug Administration to distribute a nail hardening product called "Scientifique" in the United States. Judge Solomon also found that Dinerstein was distributing a nail hardener similar in substance to "Scientifique" under the name "Living Nail" through defendant Bendyne and had applied for a patent on the nail protector shield in his own name. As part of an interlocutory judgment entered on January 4, 1972, Judge Solomon ordered defendants Dinerstein and Bendyne to account for all profits from the sale of "Scientifique" and "Living Nail" and any similar product and to pay such amounts to Mavala. For the convenience of the Court, we have enclosed copies of Judge Solomon's decision and the interlocutory judgment.

In connection with the accounting, the interlocutory judgment required defendants to produce, within ten days, "all records and accounts for sales of the product 'Living Nail' and the shield protector and all income derived from such sales \* \* \* " Pursuant to the order of District Judge Edward Weinfeld, defendants have been required since 1964 to maintain such records "in sufficient form to permit ready accounting \* \* \* " (opinion of Judge Weinfeld granting plaintiffs' motion for preliminary injunction, 226 F Supp. 477 (S.D.N.Y. 1964). Judge Solomon directed the parties to attempt to agree on the amounts due under the accounting and provided that failing such agreement, the matter would be referred to a special master.

Defendants, however, did not produce the required records within the time specified in the judgment, despite repeated efforts by plaintiff to obtain them. On February 9, 1972 plaintiff moved to have defendants adjudged in contempt. This motion was adjourned at the request of defendants so as to give them another opportunity to volun-

# Letter from Michael C. Silberberg

tarily comply with the order of the Court. Defendants thereafter produced records which did not comport with the directive of Judge Weinfeld and the mandate of the judgment. They consisted merely of income tax returns for defendant Bendyne showing substantial losses for the years since 1964, and a general ledger which contained only summary entries of sales and expenses. Thus, there was no documentation whatever for the amount of sales of "Living Nail" or for the amount and nature of the expenses and disbursements claimed to have been incurred in connection with such sales.

Defendants were then requested to produce the accounts payable and accounts receivable ledgers for Bendyne since 1964. Defendants agreed to produce these ledgers but demanded that the identity of Bendyne's customers be masked on the ground that plaintiff Tinsley might utilize this information to compete against defendants Bendyne and Dinerstein. In order to expedite matters, plaintiffs consented to this arrangement and the contempt motion was withdrawn on June 2, 1972 upon defendants' representation that the records would be produced the following week.

On June 8, 1972 the records were produced for inspection at the offices of defendants' counsel. However, defendants had masked far more of their contents than the mere identity of customers. In fact, they had masked the identity of all entries in the accounts payable ledger, leaving only a series of unidentified and unintelligible numbers. Thus, plaintiffs have no way of determining the nature of expenditures and disbursements made in connection with production and marketing of "Living Nail."

Clearly, the proferred reason for masking these records is palpably insufficient. Defendants cannot in good faith argue that the identity of their customers must be kept confidential since such identity becomes public knowledge whenever a customer offers defendants' product for sale

# Letter from Michael C. Silberberg

to the general public. Yet, even assuming arguendo that the identity of defendants' customers must be concealed from plaintiffs, there can be no justification for masking the identity of entries in the accounts payable ledger. In any event, plaintiff, in an effort to avoid resort to the Court, has proposed a reasonable solution to the problem under which parties would enter into a stipulation to be "so ordered" by the Court, wherein plaintiffs' attorneys would bind themselves not to reveal the names of defendants' customers to plaintiff Tinsley without the prior consent of defendants. A copy of the proposed stipulation which was sent to defendants' counsel on June 23, 1972 is enclosed. Defendants, however, have never responded to plaintiffs' offer and several phone calls to defendants' counsel since that time have not been returned.

In view of the foregoing, defendants' refusal to unmask the records can be clearly seen to be nothing more than a continuation of their efforts over the past nine years to impede and delay the prosecution of this case. This refusal has effectively brought the accounting proceedings to a halt and plaintiff has exhausted all means of obtaining voluntary production of the records without further resort to the Court. We therefore, request that your Honor schedule an immediate conference of the parties and direct defendants to bring the masked records to the conference so that the Court may inspect them and rule on defendants' objections to their production.

Very truly yours,

Michael C. Silberberg

cc: Weil, Gotshal & Manges Attorneys for Defendants 767 5th Ave. New York, N.Y. 10022

# Letter from Michael K. Stanton to Judge Gagliardi Dated September 1, 1972 in Opposition to Foregoing Motion

[LETTERHEAD OF]

WEIL, GOTSHAL & MANGES 767 Fifth Avenue New York, N.Y. 10022

September 1, 1972

The Honorable Lee Gagliardi United States District Court United States Courthouse Foley Square New York, N.Y. 10007

Re: Tinsley, et al. v. Mavala, et al. 63 Civ. 1298

Dear Sir:

We are the attorneys for the defendants in the above action and received on August 30, 1972 a copy of a letter from Golenbock & Barell to your Honor.

On August 31, 1972 I was advised by Michael Silberberg, Esq. that we are to meet with your Honor at 4:00 P.M. in Room 110 on September 1, 1972.

The purpose of this letter is to clarify certain statements in Mr. Silberberg's letter of August 28, 1972.

Mr. Silberberg, at page 3 of his letter, characterizes defendants' unwillingness to disclose the identity of customers and the identity of suppliers as "nothing more than a continuation of their efforts for the past nine years to impede and delay the prosecution of this case." It is difficult to understand this characterization by Mr. Silberberg who has been involved in this case for less than a year. The facts are as follows:

# Letter from Michael K. Stanton

The pre-trial order in this case was entered on or about December 23, 1968. Settlement conferences before Judge McLean were conducted between April, 1970 and June, 1970. During the summer of 1970, then Chief Judge Sugarman advised counsel that this action together with several other non-jury cases would be assigned to Mr. Justice Solomon for trial in the Fall. On October 9, 1970, the calendar clerk advised counsel that the trial would commence on Manage April 26, 1970. The trial was conducted on October 26, 1970 and thereafter post-trial briefs were submitted.

In mid-September, 1971, plaintiffs' counsel communicated with Judge Solomon who posed two questions to plaintiffs' counsel. At the request of Judge Solomon, additional correspondence was submitted to him in connection with the questions he asked. On November 11, 1971 Judge Solomon's opinion was filed. The interlocutory judgment herein was entered on January 4, 1972. Plaintiffs' counsel then requested information concerning the profits arising out of sales of "Living Nail" and the books and records maintained in connection with the business.

They were advised that from the commencement of the operation of Bendyne, Ltd., all of the books and records were maintained by the certified public accounting firm of Ash & Parsont of 11 West 42nd Street, New York, N.Y. All entries were made in such books and records by employees or partners of that certified public accounting firm. At the first meeting with plaintiffs' counsel in February, 1972, the individual defendant and William Parsont of Ash & Parsont were present to explain the manner in which the books and records were prepared and maintained and to answer any questions plaintiffs' counsel might pose.

In early February, 1972, copies of the corporate income tax returns of Bendyne, Ltd. were provided to plaintiffs'

### Letter from Michael K. Stanton

counsel for the period 1964 through 1971, demonstrating continuing losses in each year despite the fact that neither the individual defendant nor his wife, who were primarily responsible for the operation of the business, received any compensation throughout the seven-year period. Said returns reflected all income derived from sales of "Living Nail" and all expenses incurred in the business.

Thereafter and in the latter part of February, 1972, plaintiffs' counsel were supplied with the general ledgers and journals of Bendyne, Ltd. for the fiscal years ending May 31, 1965 through and including May 31, 1971. These records set forth in detail summaries of income and expenses for the six-year period. Subsequent to such review, and in late February, 1972, plaintiffs' counsel requested that they be supplied with the books of original entry such as the accounts receivable ledger, accounts payable ledger, cash disbursements journal, and other underlying records. I discussed this matter with Leonard Wagman, Esq. who has been in charge of this matter since its inception, and pointed out to him that in view of the continuing direct competition between Bendyne, Ltd. and Mavala, Inc., we wished to protect the identity of the customers of Bendyne, Ltd. as well as the names of the suppliers and other entities with which Bendyne, Ltd. dealt. Mr. Wagman indicated he would be agreeable that the names of customers and suppliers be masked for the purpose of examination of defendants' books and records by representatives of the plaintiffs.

Thereafter and in early April, 1972, Mr. Silberberg suggested that in lieu of masking the records of Bendyne, Ltd., as agreed between Mr. Wagman and me, the examination of the records would be made by plaintiffs' counsel pursuant to a stipulation whereby the names of customers and suppliers could not be revealed except by Court order. On April 12, 1972, I reconfirmed to Mr. Silberberg the

# Letter from Michael K. Stanton

arrangements that I had made with Mr. Wagman in late February, 1972 and confirmed to him that his suggested procedure was unacceptable to our client. A copy of my letter of April 12, 1972 is annexed. Thereafter defendants masked the books of original entry and in late May, 1972 I advised Mr. Silberberg that the masking of the records had been completed and that all the underlying records for the six-year period would be available on reasonable notice. Such records were examined in early June 1972 by plaintiffs' counsel.

It is quite obvious that there have been no profits arising out of the sale of "Living Nail". The tax returns prepared by the certified public accountants for Bendyne, Ltd.

demonstrate aggregate losses of over \$100,000.

Accordingly it is submitted that counsel are in a position at this time to stipulate to the fact that no profits have been earned from the sales of "Living Nail" or the adhesive protector shield by the defendants.

Very truly yours,

Michael K. Stanton For Weil, Gotshal & Manges

MKS:ig Enclosure By Hand

cc: Golenbock & Barell, Esqs. 60 East 42nd Street New York, N.Y. 10017 By Hand

# Notice of Motion to Modify the Interlocutory Judgment Dated January 2, 1973

#### UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STRS .

PLEASE TAKE NOTICE that two of the defendants. Benjamin Dinerstein and Bendyne Ltd., will move this Court on Tuesday, January 16, 1973 at 4 P.M. or as soon thereafter as counsel can be heard in the Chambers of District Court Judge Lee P. Gagliardi at the United States District Courthouse, Foley Square, New York, New York, for an orger modifying an interlocutory judgment entered against the defendants in this action on January 4, 1972, by striking therefrom Paragraphs 1, 3, 4 and 5 thereof pursuant to Rule 60(d), on the grounds that newly discovered evidence demonstrates that the nail protective shield which was the subject of a patent application, filed by Benjamin Dinerstein on February 5, 1963, was unpatentable, in the public domain, and no rights could be derived therefrom: that the formulations of Mavala Scientifique and Living Nail are dissimilar; and that formulation of Living Nail is in the public domain, as more fully appears from the affidavit of Benjamin Dinerstein submitted herewith in support of the motion.

Dated: New York, New York January 2, 1973.

> Weil, Gotshal & Manges Attorneys for Defendants Office & P.O. Address 767 Fifth Avenue New York, New York 10022 Telephone: 758-7800

To:

Golenbock and Barell, Esqs.
Attorneys for Plaintiffs
60 East 42nd Street
New York, New York 10017
Telephone: Yu 6-3300

# Affidavit of Benjamin Dinerstein in Support of Foregoing Motion

#### UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

State of New York ) County of New York ) ss.:

Benjamin Dinerstein, being duly sworn, deposes and says:

- 1. I am the individual defendant in this action and the president and sole stockholder of Bendyne, Ltd., one of the corporate defendants.
- 2. I respectfully submit this affidavit to the Court in support of an application on behalf of myself and Bendyne, Ltd. that this Court modify its interlocutory judgment entered on January 4, 1972 by Mr. Justice Solomon of the District Court of Oregon, to strike therefrom Paragraphs 1, 3, 4 and 5 thereof, on the grounds that newly discovered evidence clearly demonstrates that the nail protector shield which was the subject of a patent application which I filed on February 5, 1963 was unpatentable and was in the public domain at the time the said patent application was filed. and that accordingly no rights could be derived by me or any one else therefrom; that the formulations of Mavala Scientifique and Living Nail are, both in fact and in law. quantitatively and qualitatively different and therefore not "similar" in any sense of that word; that the formulation of Mavala Scientifique is available to any individual by

# A fidavit of Benjamin Dinerstein

virtue of the disclosure of the exact formulation in U.S. Patent No. 3,382,151, issued by the United States Patent Office on May 17, 1968 to Madeleine Van Landeghem Knudsen; and on the further ground that, contrary to the conclusion reached by the Court in its opinion, Mavala Scientifique has been sold in the United States both prior to my introduction of Living Nail and subsequent thereto.

- 3. Such sale of Mavala Scientifique is similarly a matter of public record in connection with the prosecution of this application for the above U.S. Patent. Under date of July 27, 1966, Alvin Browdy, Esq., attorney for Madeleine Van Landeghem Knudsen, stated in pertinent part "that since March 30, 1964 this product has been imported into the United States and sold in department stores from coast to coast without any steps having to be taken by the Food & Drug Administration to cause the removal of this product from the market."
- 4. Thus, I respectfully submit, it is clear that from the date I introduced Living Nail until the present time, both products have been sold in department stores and other outlets throughout the United States on a competitive basis. Since I was unable to be present at the trial of this action, I do not know on what basis the Court concluded that the sale of Living Nail precluded the sale of Mavala Scientifique, but any such conclusion by the Court is contrary to fact and clearly erroneous.
- 5. In connection with the protector shield which was the subject of a patent application filed by me on February 5, 1963, such application was finally rejected by the United States Patent Office in April of 1964 because the shield, which was described and claimed by me to be an invention, was actually fully anticipated by a virtually identical shield

# Affidavit of Benjamin Dinerstein

disclosed in a U.S. Patent issued to an inventor by the name of Mabry in 1943. The Patent Office held that there was no substantial difference between the shield described in U.S. Patent No. 2,323,145 issued to Mabry in June, 1943 and the shield described in my patent application of February 5, 1963. The Mabry patent expired in June, 1960, and upon expiration of the patent the subject matter disclosed therein became public property which could be used by any one without any license from the patentee.

6. Based upon the foregoing, I respectfully submit to the Court that there is no property interest or other right which I could have acquired through the filing of the patent application on February 5, 1963 for the nail protector shield described therein.

Accordingly, I respectfully submit to the Court that neither I nor Mr. Tinsley nor anyone could acquire any title or property interest in the subject matter of the February 5, 1963 patent application which was the subject of the order issued by District Judge Weinfeld on February 14, 1964.

7. I further respectfully submit to this Court that the finding that the formulas for Mavala Scientifique and Living Nail are similar is directly contrary to the result of scientific tests conducted by independent experts and is directly opposed by the uncontradicted testimony of Mr. Cyril Kimball. Although plaintiffs and their counsel had originally urged upon Judge Weinfeld that the formulas for Mavala Scientifique and Living Nail are identical, no such testimony was urged upon the Court at the trial. Indeed, any such testimony would have been incredible in view of the scientific documentary evidence to the contrary.

# Affidavit of Benjamin Dinerstein

8. Moreover, the prosecution history of the U.S. Patent applications which ultimately matured into U.S. Patent No. 3,382,151 unequivocally proves that the formulation of Mavala Scientifique is not similar to but instead patentably distinct from the formulation of Living Nail, and that the formulation of Living Nail is unpatentable by virtue of the fact that it is and has been in the public domain since long before the formulation of Mavala Scientifique was conceived.

Wherefore, I respectfully request that the application of myself and Bendyne Ltd. for the modification of the interlocutory judgment entered on January 4, 1972 by deleting therefrom Paragraphs 1, 3, 4 and 5 for the reasons heretofore stated be granted in all respects.

Benjamin Dinerstein

(Sworn to January 2, 1973.)

# Affidavit of Michael C. Silberberg in Opposition to Foregoing Motion

### UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

State of New York ) County of New York ) ss.:

Michael C. Silberberg, being duly sworn, deposes and says:

- 1. I am an attorney associated with the firm of Golenbock and Barell and am fully familiar with the facts of this action. I am duly admitted to practice in the State of New York and am a member of the bar of this Court.
- 2. I make this affidavit in opposition to a motion by defendants, C. Benjamin Dinerstein, C.B. Sales Co., and Bendyne Ltd., which seeks an order striking paragraphs 1, 3, 4 and 5 from the interlocutory judgment entered against the defendants in this action over one year ago on January 4, 1972 on the grounds of "newly discovered evidence".
- 3. It is plaintiffs' position succinctly stated that the motion should be denied since it is without basis in fact or law and is yet another frivolous attempt by defendants over the course of ten years of litigation to delay and prevent an accounting of profits by reason of the breach by defendant Dinerstein of fiduciary obligations arising out of a joint venture with plaintiff Tinsley to market cosmetic products in the United States. Indeed each of the grounds

now presented as a basis for modifying the judgment were previously presented to District Judge Gus Solomon in support of defendants' proposed counter-judgment and were rejected by Judge Solomon at that time. Moreover, as set forth more fully below, Mr. Dinerstein in his renewed effort to expunge from the judgment the award to plaintiff Tinsley of a one-half interest in the patent rights to a fingernail protector shield, has blatantly misrepresented the facts concerning the status of such patent rights and has withheld from the Court certain material facts which clearly mandate the denial of such motion.

#### I.

# Procedural History

- 4. The facts of this action are the subject of two lengthy opinions. The first, by District Judge Edward Weinfeld, filed on January 30, 1964, granted plaintiff's motion for a preliminary injunction. Judge Weinfeld's opinion is reported at 226 F.Supp. 477 (S.D.N.Y. 1964). The second opinion was filed on November 11, 1971 by District Judge Gus Solomon after trial in the action. The two opinions taken together, conclusively find the following facts:
  - a. Defendant Mavala, Inc., a New York corporation, was formed in April, 1962 by plaintiff Tinsley and defendant Dinerstein to distribute plaintiff's cosmetic products, including "Scientifique", a formaldehyde base fingernail hardener, in the United States. This corporation was jointly owned by Tinsley and Dinerstein to carry out their joint venture and it was agreed that Tinsley and Dinerstein would divide the profits equally;
  - b. The United States Food and Drug Administration would not approve "Scientifique" for dis-

tribution in the United States because it feared the formaldehyde base might damage the cuticles and soft tissues of the user. Thus, Mavala, acting through Dinerstein, hired Foster D. Snell, a patent consulting firm, to obtain FDA approval for distribution of "Scientifique" in the United States. Snell was paid with Mavala funds. In order to meet FDA objections, Dinerstein and Snell developed an adhesive back foil shield (the "nail protector shield") which, when applied over the end of the user's fingers, protected the cuticle.

- c. Instead of utilizing the shield to distribute "Scientifique" for Mavala, however, Dinerstein surreptitiously formed a separate Delaware corporation, Bendyne Ltd. and began to distribute a formal-dehyde base nail hardener like "Scientifique" under the name "Living Nail". He also applied for a patent in the nail protector shield in his own name. The Food and Drug Administration approved the sale of "Living Nail" on condition that each box contained a set of the nail protector shields.
- 5. Plaintiffs' application for a preliminary injunction was granted by Judge Weinfeld in January, 1964. Dinerstein was enjoined during the pendency of the action from transferring or abandoning any right in the patent application for the nail protector shield. He was also required to maintain records for all profits from the sale of Living Nail and the nail protector shield so as to permit a ready accounting. (A copy of this injunctive order is annexed hereto as Exhibit A.) The basis of Judge Weinfeld's injunction was that plaintiff had made a substantial showing that Dinerstein had breached fiduciary obligations owed to Tinsley and to Mavala by diverting the nail protector shield

to his own corporation, Bendyne Ltd. so as to justify relief pendente lite.

6. Upon full trial of this action in November, 1970, Judge Solomon sustained plaintiffs' claim and found that Dinerstein in disregard of his fiduciary obligations to Mavala and in disregard of his joint venture obligations to Tinsley had diverted to himself and his corporation not only the patent rights in the nail protector shield, but also the profits which would have accrued from the sale of "Scientifique" in the United States. He also found that plaintiffs were entitled to recovery of \$80,676 plus interest for cosmetic products sold and delivered.

#### II.

# The Interlocutory Judgment and Rejection of Defendant's Previous Application

- 7. On January 4, 1972, an interlocutory judgment (Exhibit B) in a form proposed by plaintiffs was entered in accordance with Judge Solomon's opinion. The judgment made Judge Weinfeld's preliminary injunction permanent and, in addition, contained the following provisions, which defendants more than one year later, seek to expunge:
  - a. "Plaintiff shall recover from defendants on the first count of the complaint, the sum of \$80,676.00 together with interest from May 3, 1963." [Paragraph 1]
  - b. "Plaintiff Tinsley is declared to be the owner of one-half of all the capital stock of Mavala, Inc." [Paragraph 3]
  - c. "Defendant Dinerstein shall within 10 days after the date of this interlocutory judgment trans-

fer to plaintiff Tinsley an undivided one-half interest in all patent rights to the nail protector shield." [Paragraph 4]

- d. "Defendants shall within 10 days after the date of this interlocutory judgment, produce for inspection and copying by plaintiffs, all records and accounts for sales of the product "Living Nail" and the shield protector and all income derived from such sales, which records they were required to maintain pursuant to the order of District Judge Edward Weinfeld dated February 14, 1964. Within 5 days thereafter, the attorneys for plaintiffs and defendants shall commence meetings for the purpose of determining and agreeing upon the amount of profits due Mavala, Inc. from the sale of "Scientifique" and "Living Nail". In determining net profits, no salary or other compensation shall be deducted for services performed by defendant Dinerstein or any member of his family. Not later than 30 days after the date of this interlocutory judgment, the parties shall advise the Court as to whether they have been able to agree upon the amounts due Mavala, Inc. If they are unable to agree, the matter shall be referred to a Special Master." [Paragraph 5]
- 8. Each of the grounds now asserted by defendants in support of their motion to delete the above-quoted provisions however were previously presented to Judge Solomon at the time the interlocutory judgment was signed. They are contained in a letter dated December 28, 1971 submitted by defendants' counsel Michael Stanton to Judge Solomon in support of defendants' proposed counter-judgment. (A copy of this letter is annexed hereto as Exhibit C.) Each of these arguments was squarely rejected by Judge Solo-

mon in a letter to the parties dated December 31, 1971 informing them of his decision to sign plaintiff's proposed judgment. In his letter Judge Solomon also requested that plaintiff not attempt to reach the patent rights in the nail protector shield under paragraph 4 of the interlocutory judgment until 30 days from final judgment so as to give defendants an opportunity to appeal this portion of his order. Plaintiffs, pursuant to Judge Solomon's request, have refrained from doing so. (A copy of Judge Solomon's letter is annexed hereto as Exhibit D.)

9. Against this background, it can be clearly seen that the instant motion is little more than an ill-disguised extempt by defendants to hinder and delay the final prosecution of this action. Indeed, none of the grounds for overruling Judge Solomon are based upon "newly discovered evidence" as contended by defendants; quite to the contrary, defendants' contentions are the subject of previous rulings in this action which are the "law of the case" and thus, controlling on this motion.

#### III.

# Analysis of Defendants' Arguments

- 10. Even assuming arguendo that Judge Solomon's previous rejection of defendants' arguments is not controlling, a careful scrutiny of the Dinerstein affidavit reveals that (i) each of the alleged "new facts" upon which relief from judgment is sought were known or should have been known to defendants at the time of trial in this action and, in any event, (ii) such facts are irrelevant and do not support the request for the extraordinary relief sought herein.
- 11. Manifestly, there are no facts whatsoever set forth for deletion of the provisions of paragraphs 1 and 3 of the

interlocutory judgment. In finding that plaintiffs were entitled to a judgment of \$80,676 on the first count of the complaint, Judge Solomon found the following:

"Plaintiffs in their first Cause of Action allege that Dynos sold and delivered \$101,160 worth of 'Chatton' eyeliner to Mavala, based upon a unit price of seventy-five cents. Mavala paid \$20,484 on account, and plaintiffs claim the balance of \$80,676.

"Defendants offered no evidence that the price of 'Chatton' was other than the invoice price and at the conclusion of the trial I found that plaintiffs were entitled to a judgment for \$80,676 on account." [Opinion, page 3]

The Dinerstein affidavit does not even address itself to this aspect of the judgment nor set forth any reasons whatsoever why the provisions of paragraph 1 should be deleted. Accordingly, these provisions should be left undisturbed.

12. Defendants similarly fail to set forth any reason for deletion of paragraph 3 of the interlocutory judgment which awards plaintiff Tinsley one-half of all of the capital stock of Mavala, Inc. In fact, the question is nowhere discussed in the Dinerstein affidavit. Indeed, Tinsley's right to half of the stock in Mavala was explicitly recognized by Judge Weinfeld in 1964 wherein he stated:

"\* \* \* [I]t is also clear that equal ownership of the defendant corporation was shared by Tinsley, the individual plaintiff and affiliated interests, and Dinerstein, the individual defendant \* \* \* " 226 F. Supp. 477.

This finding was adhered to by Judge Solomon who after trial held that "Tinsley is declared to be the owner of onehalf of all the capital stock of Mavala." [Opinion, page 7.]

The Dinerstein affidavit sets forth no basis for disturbing this portion of the interlocutory judgment.

- 13. As a predicate for modifying the interlocutory judgment to delete paragraphs 4 and 5, Dinerstein in paragraph 2 of his affidavit urges the following "newly discovered facts":
  - a. That the patent application on the nail protector shield was rejected in April, 1964 "and that accordingly, no rights could be derived by me or anyone else therefrom":
  - b. That the formulations of Mavala "Scientifique" and "Living Nail" are "both in fact and in law, quantitatively and qualitatively different and therefore 'not similar' in any sense of that word"
  - c. That the "formulations of Mavala 'Scientifique' is available to any individual by virtue of the disclosure of the exact formulation in U.S. Patents 3,382,151 issued by the U.S. Patent Office on May 17, 1968 to Madeleine Van Landeghem Knudsen"; and
  - d. That "Mavala 'Scientifique' has been sold in the United States both prior to [the] introduction of 'Living Nail' and subsequent thereto'.
- 14. As will be demonstrated below, none of the above "facts" are "newly discovered" or provide a basis for modifying the judgment as requested by Dinerstein. Indeed, Dinerstein nowhere states in his affidavit that these facts were unknown to him at the time of trial in this action. Moreover, an investigation by plaintiff of Dinerstein's statements concerning that patent application reveals that such statements are false and misleading and constitute a

brazen attempt to conceal from the Court and from plaintiff the true facts concerning his diversion of patent rights in the nail protector shield.

- 15. Plaintiffs' investigation which has included inter alia a search of the records of the United States Patent Office has revealed the following:
- a. Dinerstein did not, as stated in his affidavit file only one application for the nail protector shield in 1964. In fact, he filed three such applications. The first, which he has never disclosed to plaintiff or the Court, was filed on January 24, 1964 and culminated in the issuance of U.S. Patent 3,245,418 on April 12, 1966 (Exhibit E). The second, and only one mentioned by Dinerstein in his affidavit, was filed one day later on January 25, 1964 and was rejected and abandoned by Dinerstein in April, 1964 (Exhibit F). The third, which has also never been disclosed, was filed three months after such rejection on July 28, 1964 and culminated in the issuance of U.S. Patent 3,382,878 on May 14, 1968 (Exhibit G).
- b. "Living Nail" has been and continues to be distributed with a nail protector shield bearing the notice "Patent No. 3,382,878".
- 16. Under the terms of Judge Weinfeld's order granting a preliminary injunction, Dinerstein was required to file an affidavit with the Court setting forth all steps taken with respect to the patent application for the nail protector shield and the status of such application. On April 2, 1964, Dinerstein filed an affidavit in which he only revealed the status of the second application of January 25, 1964. (A copy of this affidavit is annexed hereto as Exhibit H.) Thus, Dinerstein wilfully concealed from the Court and from plaintiff Tinsley the existence of the application of

January 24, 1964, which resulted in the issuance of U.S. Patent 3,245,418. Moreover, he took no steps to inform plaintiff or the Court of the abandonment of the January 25, 1964 application several days subsequent to the filing of his affidavit and further failed to make known the subsequent filing of the July 28, 1964 application which resulted in U.S. Patent 3,382,878.

- 17. Clearly, Dinerstein's decision to reveal only the second patent application and to abandon this application in favor of submitting a new application several months thereafter was a deliberate attempt to deprive Tinsley of his rights to the nail protector shield. His attempt now to expunge from the judgment the award to Tinsley of half the patent rights to the nail protector shield on the ground that no patent was ever issued while at the same time concealing the existence of the other patents is but another incredible episode in his continuing pattern of deceptive conduct which has been condemned by two courts. Such conduct should be further condemned here.
- 18. It is clear that these undisclosed patents were intended to be and in fact are embraced by Judge Solomon's broad language awarding to Tinsley, "an undivided one-half interest in all patent rights to the nail protector shield" [Opinion, pg. 7 and interlocutory judgment, para. 4; emphasis supplied]. Each such application was submitted to the patent office during the period when Dinerstein owed a fiduciary obligation to Mavala and Tinsley individually, as found by both Judge Weinfeld and Judge Solomon. They are clearly a product of the research paid for with Mavala funds. Moreover, defendants' counsel during closing arguments at trial on October 26, 1970 in response to Judge Solomon's direct question conceded that the shield

being sold with "Living Nail" was the shield which was the object of Tinsley's claim for relief:

The Court: "Is that nail preparation being sold at the present time?"

Mr. Stanton: "Yes, your Honor, Living Nail?"

The Court: "Yes."

Mr. Stanton: "Living Nail is being sold, yes, your Honor."

The Court: "Living Nail is being sold with the shield?"

Mr. Stanton: "Yes, your Honor." (Trial Transcript, page 116).

Thus, Dinerstein's motion insofar as it seeks to expunge the award of patent rights to Tinsley, should be rejected.

- 19. Dinerstein's further assertions that the specified provisions should be expunged from the judgment on the ground of (i) alleged differences in the formulas of "Scientifique" and "Living Nail"; (ii) the existence of an alleged patent for "Scientifique", and (iii) the alleged sale of "Scientifique" in this country, similarly failed to provide any basis for the relief sought. Each such argument was advanced to Judge Solomon at trial and was rejected. Accordingly, such argument cannot serve as a basis for modifying the judgment on grounds of "newly discovered evidence".
- 20. More importantly, however, each such argument is utterly irrelevant to issue of liability on the part of defendants in this action. Indeed, it matters not that there are subtle differences between "Living Nail" and "Scientifique", or that "Scientifique" may or may not have been sold in the United States by others or is protected by patent. Here, the predicate of liability as found by both

Judge Weinfeld and Judge Solomon is that "Scientifique" and "Living Nail" whatever their precise chemical composition are both formaldehyde based nail hardeners and that it was a breach of fiduciary duty on the part of Dinerstein to divert the nail protector shield to his own corporation and to market "Living Nail" instead of utilizing the shield and his energies to market "Scientifique" for Mavala.

#### IV.

#### Conclusion

21. It should be clear from the foregoing that the instant motion is but one more frivolous attempt by defendants to avoid the accounting ordered by Judge Solomon and should be in all respects rejected by this court. The accounting which has been repeatedly delayed by defendants refusal to maintain and produce the required records should be completed without further delay and final judgment should be entered accordingly.

Michael C. Silberberg

(Sworn to January 30, 1973.)

# Exhibit A Annexed to Affidavit of M. C. Silberberg Order Granting Preliminary Injunction and Other Relief

# UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

This cause having come on to be heard on plaintiffs' motion for a preliminary injunction pending the trial of this action and for other relief, and the plaintiffs having submitted the Order to Show Cause dated November 30, 1963 signed by the Honorable Edward C. McLean, bringing on the aforesaid motion for hearing and the affidavits of plaintiff Frederic E. Tinsley and Henry C. Shays, Esq., verified the 27th day of November, 1963 annexed to said Order to Show Cause, and the reply affidavit of Henry C. Shays, Esq., verified the 12th day of December, 1963, and plaintiffs exhibits, all in support of said motion; and the defendants having submitted the affidavit of C. Benjamin Dinerstein, verified the 9th day of December, 1963, and defendants' exhibits, all in opposition to said motion, and the court having considered all of the foregoing and the pleadings herein; and the court having heard Leonard W. Wagman of Golenbock and Barell, attorneys for the plaintiffs in support of said motion and Mitchell M. Bailey of Pross, Smith, Halpern & Lefevre, defendants' attorneys, in opposition thereto:

And the Court having filed its opinion on January 30, 1964, and it appearing that

(1) the defendant corporation, Mavala, Inc., was formed for the purpose of exploiting and distributing in

# Exhibit A Annexed to Affidavit of M. C. Silberberg

the United States certain Mavala products manufactured abroad by plaintiff Anstalt Dynos including Mavala Scientifique, a formaldehyde fingernail hardener; (2) the defendant Mavala, Inc. is jointly owned in equal shares by the plaintiff Tinsley and affiliated interests and the defendant Dinerstein: (3) the defendant Dinerstein was to serve and did serve as chief executive officer in charge of the affairs of Mavala, Inc. and the defendant Dinerstein was and is in a fiduciary relationship to the plaintiffs and to Mavala. Inc.; (4) as a result of such relationship and in the course of efforts on behalf of Mavala, Inc. to obtain approval from the Food and Drug Administration for the sale of Mavala Scientifique in the United States, the defendant Dinerstein received from the plaintiffs knowledge of the formula for the formaldehyde fingernail hardening product Mavala Scientifique, and developed in conjunction with the consulting chemist for the defendant Mavala, Inc., a foil shield to protect the skin surrounding the fingernail: (5) after this lawsuit was commenced, the defendant Benjamin Dinerstein formed a corporation known as Bendyne, Ltd., which corporation, controlled by him, is using and exploiting a foil shield in conjunction with the sale of a nail hardener, which shield is not significantly different from the protective shield developed for the defendant Mavala, Inc.

And it further appearing to the Court, after due deliberation, that the interests of the plaintiffs in the fingernail hardening product Mavala Scientifique and the protective shield should be protected pending the trial and determination of this action, and that the distribution by defendant Dinerstein through Bendyne, Ltd. of a formaldehyde nail hardening product and a nail protector, may constitute a breach of fiduciary duty and invade the property rights of plaintiffs and Mavala, Inc., and that such claims are substantial and sufficient to entitle plaintiffs to relief pending a final determination of the issues upon a trial and that

# Exhibit A Annexed to Affidavit of M. C. Silberberg

plaintiffs may be irreparably damaged unless defendants are restrained and enjoined, it is

Ordered, that the defendant C. Benjamin Dinerstein, his agents, servants, employees and attorneys and all persons in active concert and participation with him be and they hereby are restrained and enjoined during the pendency of this action from directly or indirectly transferring any claimed right or any interest in and to the patent and pending patent application for the nail protector shield, or abandoning, suffering o consenting to any loss of rights or diminution of value in the said patent and pending patent application, to any person, firm or corporation, and from permitting Bendyne, Ltd. to do any of the foregoing; and it is further

Order the defendant C. Benjamin Dinerstein, through his attorneys, shall serve upon the attorneys for the plaintiffs a sworn statement detailing all steps taken by said defendant or his agents, servants, employees and attorneys and all persons in active concert and participation with him in respect of the patent application for the aforesaid nail protector shield and the present status of such application and all agreements and negotiations with others with regard thereto; and it is further

Ordered, that the defendant C. Benjamin Dinerstein shall direct and require Bendyne, Ltd. to keep accurate accounts and records of all sales of the product "Living Nail" and the shield protector and all income derived from such sales, such records to be kept in sufficient form to permit a ready accounting of all such transactions; and it is further

Ordered, that the defendant C. Benjamin Dinerstein, his agents, servants, employees and attorneys and all persons

# Exhibit A Annexed to Affidavit of M. C. Silberberg

in active concert and participation with him be and they hereby are restrained and enjoined from directly or indirectly revealing to any person, firm or corporation the formula or its component parts, obtained from plaintiffs for Mavala Scientifique and they and each of them be and hereby are restrained from directly or indirectly revealing to any person, firm or corporation, any trade secrets and sales information derived or obtained by reason of defendant Dinerstein's relationship to the plaintiffs and interest in defendant Mavala, Inc.; and it is further

ORDERED, that the foregoing relief is granted and directed without prejudice to a further application for injunctive relief upon completion of the defendant's deposition; and it is further

Ordered, that plaintiffs' motion to strike defendant's answer and counterclaim for the willful failure of defendant Dinerstein to appear and give his deposition is denied upon the condition that he appear and give such deposition at Room 601 of this Courthouse on February 25th, 1964 at 10 A.M. on that date and thereafter from day to day until such deposition is completed [unless the parties shall stipulate otherwise]; upon such deposition the defendants are ordered to produce for inspection and copying all relevant documents, books, correspondence and records of any nature whatsoever relevant to the subject matter of this action; and it is further

ORDERED, that in the event the defendant Dinerstein fails to appear at the time and place hereinabove designated for the taking of his deposition, then in such event the plaintiffs' motion to strike the answer and counterclaim of the defendants shall be and the same hereby is granted and upon such failure to appear plaintiffs shall apply to this

Court, upon notice to defendants' attorneys for a judgment of dismissal; and it is further

Ordered, that upon the completion of the defendant Dinerstein's deposition and upon its filing in accordance with Rule 30(f) of the Federal Rules of Civil Procedure, the defendant may then serve a notice returnable not less than ten days thereafter setting a day for the taking of plaintiff's deposition at Room 601 of this Courthouse and the plaintiff's examination shall continue from day to day thereafter until completed; in connection therewith the defendant Dinerstein shall pay to the plaintiff the sum of \$982.30 to reimburse the plaintiff for his reasonable expenses in traveling to this country and in addition thereto the sum of \$30 per diem for each day of travel and attendance upon the taking of plaintiff's deposition; the aforesaid sum of \$982.30 for travel expense shall be paid not less than 5 days before plaintiff's required appearance, and the per diem daily sum shall be paid within 5 days after the completion of plaintiff's examination. It is further

Ordered, that the motion for summary judgment in favor of the plaintiff Anstalt Dynos upon the first count of the complaint is denied, without prejudice to the renewal thereof after the conclusion of defendant's deposition; and it is further

Ordered, that plaintiffs' motion for leave to serve an amended and supplemental complaint to add as a defendant Bendyne, Ltd., a Delaware corporation, be and the same hereby is granted and the amended and supplemental complaint annexed hereto shall be deemed served and filed upon the entry of this Order; and it is further

Ordered, that upon plaintiffs' filing with the Clerk of this Court a bond in the sum of Seven Thousand Five Hundred (\$7,500) Dollars in accordance with the provisions of Rule 65, Federal Rules of Civil Procedure, the foregoing provisions of this Order enjoining and restraining the defendant Dinerstein and all persons referred to in said Rule 65 shall become effective and remain in full force and effect until final hearing of this cause and until further order of this Court.

Dated: New York, N. Y. February 14th, 1964.

> /s/ Edward Weinfeld U.S.D.J.

### Exhibit B Annexed to Affidavit of M. C. Silberberg Interlocutory Judgment Entered January 4, 1972

### UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

This cause having been considered by this Court upon the pleadings and evidence presented on trial and upon briefs of counsel for the parties and upon the findings of fact and conclusions of law set forth in the opinion filed in this Court on November 11, 1971, it is hereby

ORDERED, ADJUDGED AND DECREED as follows:

- 1. Plaintiffs shall recover from defendants on the first count of the complaint the sum of \$80,676.00 together with interest from May 3, 1963.
- 2. The preliminary injunction entered by District Judge Edward Weinfeld on February 14, 1964 is hereby made permanent and defendant C. Benjamin Dinerstein, his agents, servants, employees and attorneys and all persons in active concert and participation with him are hereby permanently restrained and enjoined from directly or indirectly transferring any claimed right or any interest in and to the patent and pending patent application for the nail protector shield, or abandoning, suffering or consenting to any loss of rights or diminution of value in the said patent and pending patent application, to any person, firm or corporation, and from permitting Bendyne, Ltd. to do any of the foregoing and are further permanently restrained and enjoined from directly or indirectly revealing

to any person, firm or corporation the formula or its component parts, obtained from plaintiffs for Mavala "Scientifique" and they and each of them are restrained from directly or indirectly revealing to any person, firm or corporation, any trade secrets and sales information derived or obtained by reason of defendants' relationship to the plaintiffs and interest in defendant Mavala, Inc.;

- 3. Plaintiff Tinsley is declared to be the owner of one-half of all the capital stock of Mavala, Inc.;
- 4. Defendant Dinerstein shall within 10 days after the date of this interlocutory judgment transfer to plaintiff Tinsley an undivided one-half interest in all patent rights to the nail protector shield.
- 5. Defendant shall within 10 days after the date of this interlocutory judgment, produce for inspection and copying by plaintiffs all records and accounts for sales of the product "Living Nail" and the shield protector and all income derived from such sales, which records they were required to maintain pursuant to the order of District Judge Edward Weinfeld dated February 14, 1964. Within 5 days thereafter, the attorneys for plaintiffs and defendants shall commence meetings for the purpose of determining and agreeing upon the amount of profits due Mavala, Inc. from the sale of "Scientifique" and "Living Nail". In determining net profits, no salary or other compensation shall be deducted for services performed by defendant Dinerstein or any member of his family. Not later than 30 days after the date of this interlocutory judgment, the parties shall advise the Court as to whether they have been able to agree upon the amounts due Mavala, Inc. If they are unable to agree, the matter shall be referred to a Special Master.

- 6. Within 30 days after entry of a final judgment in this action, defendants shall pay to Mavala, Inc. all sums found to be due pursuant to paragraph 4 above with interest from May 3, 1963. Prior to such time, plaintiff Tinsley may by written notice to defendants elect to receive one-half of such sum in which case, payment of one-half the sum shall be made directly to him.
- 7. The undertaking in the amount of \$7500 filed by plaintiff on February 25, 1964 is hereby discharged and released.
- 8. The issue of the award of attorneys fees and costs to plaintiffs is reserved for determination at the settlement of a final judgment.
- 9. Jurisdiction of this action is retained for the purpose of making any further orders to carry into effect this interlocutory judgment and to determine the amount of profits to be paid to Mavala, Inc. or plaintiff Tinsley, and the amount of attorneys fees and costs, if any, to be paid to plaintiffs, and any further orders necessary or proper to be made to effect a final adjustment and settlement of this controversy between plaintiffs and defendants.

/s/ Gus J. Solomon U.S.D.J.

Judgment entered 1/4/72 John Livingston

## Exhibit C Annexed to Affidavit of M. C. Silberberg Letter Dated December 28, 1971

WEIL, GOTSHAL & MANGES 767 Fifth Avenue New York, N. Y. 10022

December 28, 1971

Hon. Gus J. Solomon Chief Judge United States District Court Portland, Oregon 97205

Re: Tinsley v. Mavala, Inc.

Dear Judge Solomon:

This letter is being written in support of the defendants' application for a stay of a portion of the judgment submitted on their behalf.

It is respectfully submitted to the Court that certain of the findings of fact and conclusions of law incorporated in the opinion of November 11, 1971 are inconsistent with the record and are not supported by the weight of the evidence.

It is submitted that the testimony does not support a finding that Snell and Dinerstein invented an adhesive backed shield. The testimony of Dinerstein and Cyril Kimball, former president of Snell, is in complete accord to the effect that Dinerstein alone designed said shield, which was the subject of a patent application filed in the United States Patent Office by Dinerstein on February 5, 1963; moreover, said patent application was the subject of an official rejection by the United States Patent Office in April of 1964 for lack of patentable subject matter. Similarly there was no support in the record for the finding at Page 3 of the opinion that Dinerstein offered to sell Tinsley the right to use

the shield in Europe. At all times Dinerstein claimed exclusive right to said shield.

It is submitted that chemical analyses offered in evidence at the trial and the testimony of Mr. Kimball demonstrated that the formula for the products "Scientifique" and "Living Nail" are dissimilar both from a quantitative and qualitative point of view. At trial, plaintiffs did not offer any evidence to establish any similarity of the formulations. We believe that any such proof would have been impossible in view of the results reached by the testing procedures. In addition, the formula of "Scientifique" is the subject of a patent which renders it unique and therefore dissimilar from any other formula. Further, the formulation of "Living Nail" was in the public domain since March, 1958; i.e., before the time Dinerstein commenced its use, as evidenced by the prosecution file history of plaintiffs' own United States patent.

In addition, the finding that "Scientifique" has never been distributed in the United States, is contrary to fact since it has been sold through several American distributors from March 30, 1964 to date. References to such distributors and ads concerning the sale of "Scientifique" are the subject of several exhibits in the depositions. Further, plaintiffs' patent counsel has confirmed the sale in department stores throughout the United States since March 30, 1964. Such facts are confirmed in the affidavit of Alvin Browdy, Esq., patent counsel to Madam Vanlandegnem, where he confirmed to the United States Patent Office that "Scientifique" had been imported into the United States since March 30, 1964, and had been sold in department stores from coast to coast, without any steps having been taken by the Food and Drug Administration to cause the removal of this product from the market.

In view of the contents of the post trial memorandum submitted to the Court on behalf of the defendants, and in

view of our letters to your Honor of October 13, 1971 and November 3, 1971, we do not intend to set out at length again our position on the unique and far reaching legal conclusion that your Honor has reached, which we sincerely be ieve goes beyond the scope of any opinion rendered by the Court of Appeals of the State of New York.

Thank you for your consideration regarding these

points.

### Respectfully submitted,

Michael K. Stanton For Weil, Gotshal & Manges

0

MKS:GLT Air Mail Special Delivery

### Copies to:

Leonard A. Wagman, Esq. Golenbock and Barell, Esqs. 60 East 42nd Street New York, New York 10017

Mr. John Livingston Clerk of the Court United States District Court United States Courthouse Foley Square New York, New York 10007

## Exhibit D Annexed to Affidavit of M. C. Silberberg Letter Dated December 31, 1971

(Same as Exhibit C Annexed to Affidavit of Leonard W. Wagman printed herein at page 29a.)

Exhibit E Annexed to Affidavit of M. C. Silberberg

Patent No. 3,245,418

(See Opposite

1

3,245,418

SHEELDENG DEVICE FOR APPLYING NAM-HARD.
ENING COMPOSITIONS TO FINGEUNALLS
Bea Dinerstein, 40 E. 9th St., New York 3, N.Y.
Filed Jan. 24, 1954, Ser. No. 340,051

This invention relates to a novel device adapted for use in applying liquid nail-hardening compositions to

human fingernails.

Women commonly use liquid nail-hardening compositions to harden the forward portion of their finger-nails, usually referred to as the "white tips." Some of the e liquid compositions contain a substantial amount of formald-hyde and are applied by means of a small brush 15 or the like. In some people the cuticle and soft tissue surrounding the fingernails are very sensitive to irritation by formaldehyde, and such persons must take meticulous care not to contact the cuticle and soft tissue with the formuldehyde-containing nail hardening composition, 20 In order to prevent any possibility of irritation of the cuticle and soft tissue, the Food and Drug Administration requires formaldehyde-containing nail-hardening compositions to be sold together with a suitable stencil or shield which prevents the liquid nail-hardening composition 25 from coming into contact with the enticle and soft tissue.

It is an object of the present invention to provide a stencil or shield which exposes the white tip of the nail for coating with a formal lehyde-containing liquid noilhardening composition while protecting the cuticle and 30 surrounding skin against contact with the liquid compo-

sition

It is another object of the invention to provide a novel nail stened or shield which enables one rapidly to coat contacting the cuticle and surrounding skin with the

These and other objects and advantages of the invention will become apparent from the following detailed de-

scription

The novel nail stencil or shield of the present invention for applying formaldehyde-containing liquids to human nails while protecting the cuticle and surrounding skin from the liquid comprises a projecting forward end which is placed under the white tip of the nail, integral side portions which extend over the skin adjacent to the side edges of the nail, a rear portion to cover the cutiele and the skin to the rear of it, adhesive means on one face of the shield for holding it in position on the finger. a transverse aperture approximately midway between the forward and the rearward edge of the stencil, and a forwardly arched curvilinear slit forward of said transvene aparture.

" ferring now to the drawings:

. 1 is a plan view of the shielding device of the 5.5 present invention.

FIG. 2 is a partial plan view of the shielding device of FIG. 1 in which the protective backing is partially pulled

FIGS. 3 and 4 illustrate a finger with the shielding device of the invention placed in position about the finger-

FIG. 5 is a longitudinal cross-sectional vie. of FIG. 4 showing the steneil in position.

I Ici. 6 is a cross-section of FIG. 4 through line 6 FIG. 7 is a perspective view of a person's hand ready for applying liquids to the fingernails in which each finger is protected by a shielding device according to the present invention.

In the embodiment of the invention illustrated in FIGS. 1 and 3 to 7, the shielding device consists of a forward projecting portion 1, integral side portions 2 and 3 and 2

a rear portion 4, a transverse, substantially linear slit 10, and a forwardly arched curvilinear slit 11 forward of the linear slit 10.

The shielding device has an adhesive on the underside of at least the side portions 2 and 3 and preferably also under the forward portion 1. FIG. 2 illustrates the protective cover 5 for the adhesive being peeled from the underside of the stencil starting at the rearward por-The rear portion 4 does not necessarily require any adhesive since the stencil is held firmly in place by side portions 2 and 3 and by forward portion 1.

FIG. 2 also illustrates another embodiment of the shielding device according to the invention which differs from that illustrated in the other figures in that the rear edge of slit 19 is curved rearwardly to form a narrow

aperture 14 in the shielding device.

After removal of the protective cover 5, the stencil is ready to be applied to a finger 6 having a fingernail with a white tip 8 and a cuticle 9 as shown in FIG. 5. To position the shielding device on the finger, the white tip 8 of the fingernail is slipped through the linear slit 10, as shown in FIGS. 3 to 5, so that the forward portion 1 of the shielding device is beneath the white tip of the fingernail 8 and the white tip rests upon the portion 13 of the shielding device defined by the curvilinear slit 11. The integral side portions 2 and 3 and the rear portion 4 are positioned to cover the remainder of the fingernail, the skin surrounding the fingernail and the cuticle 9. The shielding device is held in position by the adhesive on the underside of the side portions 2 and 3 by pressing the side portions against the finger 6. The projecting forward portion 1 is then swung downwardly, as shown in FIGS. 4 and 5, and is pressed against the underside of fingertip 12, leaving the flap 13 defined by curvilinear fingernails with liquids comprising formaldehyde without 35 slit 11 to remain under the white tip of fingernail 3 and protrude slightly beyond the forward edge of the nail. The shielding device can be easily removed from the finger by a gentle pull on the side portions 2 and 3 or forward portion 1.

In FIG. 4, which is a side view of finger 6 with the shielding device in place, the white tip S of the fingernail overlaps the flap 13 of the shielding device and side portion 3 covers the skin surrounding the fingernail. FIG. 5, which is a cross-section of the finger 6 as shown in FIG. 4, the white tip 8 of the fingernail overlaps the flap 13, and the cuticle 9 and the remainder of the nail are covered by the rear portion 4 of the shielding de-FIG. 6, which is a cross-section of FIG. 4 along the line 6-6, shows how the side portions 2 and 3 protect the skin of finger 6 from the formaldehyde-containing liquid nail-hardening composition when it is applied to the

white tip 8 of the fingernail.

When the shielding devices are so positioned on the fingers as shown in FIG. 7, the white tips 8 of the fingernails can be treated with figuids as desired without also contacting the cuticles and the surrounding soft tissue.

The embodiment shown in FIG. 2 functions in the same way as that shown in the other figures of the drawing, the only difference being that the curved rear edge of perture 14 esposes slightly more of the fingernail tip for dry at with the nail-hardening composition. This cance innent is better adapted for use by individuals whose fingernails have white tips that are slightly arched toward the cuticle.

The shielding device is preferably made of paper because it is inexpensive and can economically be discarded after one application of the liquid nait-hardening composition. However, it may be made of other materials, such as celluioid or plastic.

Various modifications of the shielding device of the invention may be made without departing from the spirit or scope thereof, and it is to be understood that the in-



3

vention is to be limited only as defined in the appended claims.

I claim:

1. A aail shielding device for use in applying a formaldebyde-containing liquid nail-hardening composition to 5 human nails while protecting the cuticle and surrounding soft skin tissue from contact with said liquid composition, said shielding device consisting of a flat, pliable sheet material comprising a forward portion and a rearward portion, a transverse aperture between the forward and rearward edges of said sheet material, a forwardly arched curvilinear aperture forward of said transverse aperture and adhesive means on the underside of the shielding device for helding it in place.

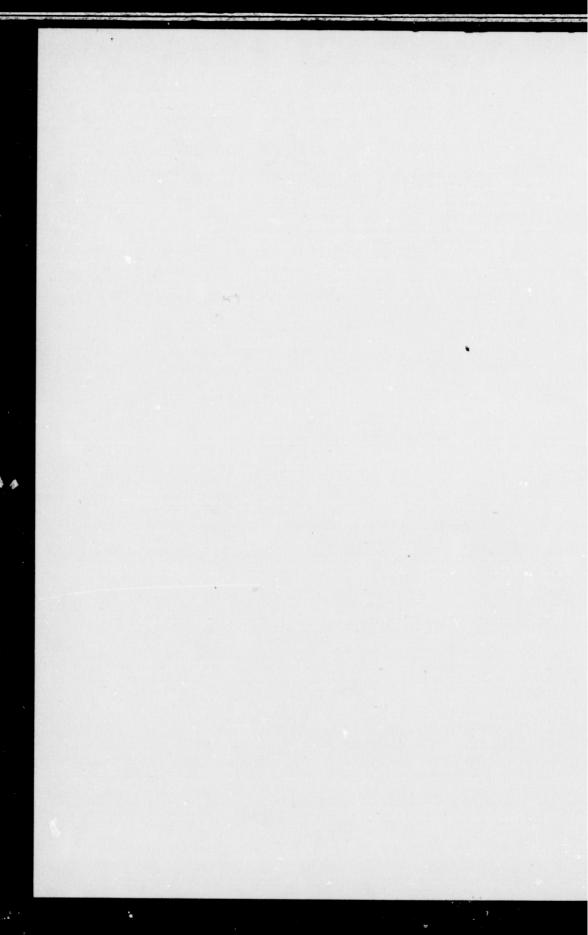
2. A nail shielding device for use in applying a form
15 altehyde-containing liquid nail-hardening composition to human nails while protecting the cuticle and surrounding

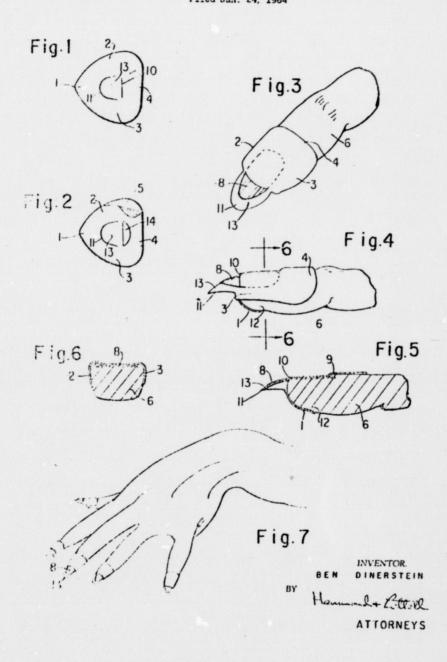
soft skin tissue from said liquid composition, said shielding device consisting of a flat, pliable sheet material comprising a forward portion and a rearward portion, a substantially linear transverse slit between the forward and rearward edges of said sheet material, a forwardly arched curvilinear slit forward of said transverse linear slit, and adhesive means on the underside of the shielding device for holding it in place.

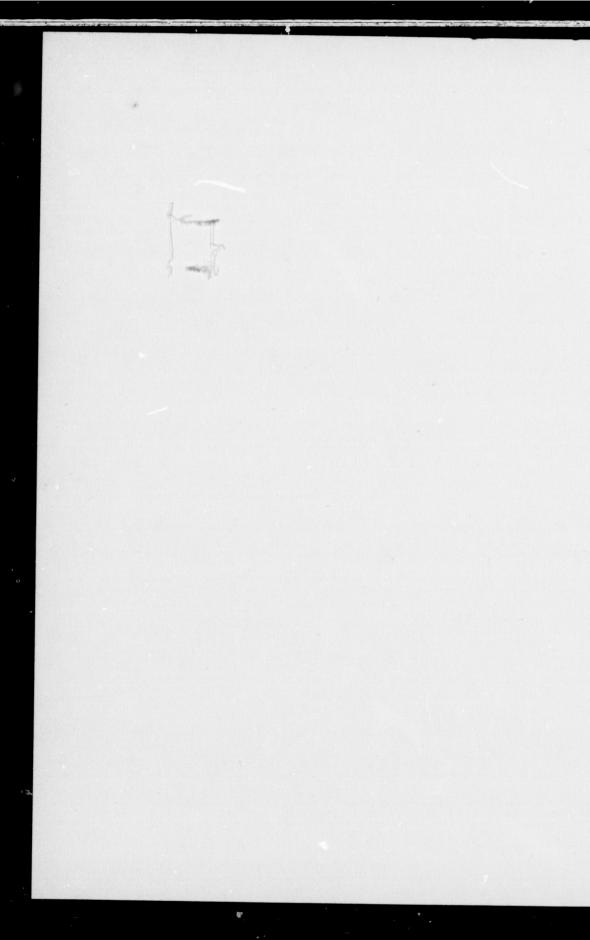
#### References Cited by the Examiner

#### 

RICHARD A. GAUDET, Primary Examiner.







# Exhibit F Annexed to Affidavit of M. C. Silberberg Patent Application

#### Stencil

The invention relates to a novel stencil adapted for use in applying coatings of lacquers or other liquid substances to human nails.

Women commonly use liquid polishes or dyes on their finger nails and toenails for cosmetic purposes or liquid nail hardeners to harden the fingernails. These liquids are usually applied by means of a small brush or the like and requires a certain degree of dexterity to coat each nail without also coating a portion of the cuticle or skin surrounding the fingernail.

It is an object of the invention to provide a stencil which exposes the nail for coating with a liquid while protecting the cuticle and surrounding skin.

It is another object of the invention to provide a novel nail stencil which enables one to rapidly coat nails with liquids.

These and other objects and advantages of the invention will become obvious from the following detailed description.

The novel nail stencil of the invention for applying liquids to human nails while protecting the cuticle and surrounding skin from the liquid comprises a projecting forward end of the stencil to extend under the end of the nail, integral side portions which extend over the skin, a rear portion to cover the cuticle and means on the side portions for holding the stencil in position.

Fig. 1 is a plan view of one embodiment of the stencil of the invention and Fig. 2 is a partial plan view of the stencil of Fig. 1 in which the protective backing is partially pulled away.

Figs. 3 and 4 illustrate a finger before and after the stencil of the invention has been placed in position about the fingernail.

Fig. 5 is a side view of Fig. 4 showing the stencil in position and Fig. 6 is a cross-section of Fig. 5. Fig. 7 is a cross-section of Fig. 4 through line 7-7.

Fig. 8 is a plan view of a person's hand ready for applying liquids to the fingernails in which each finger is protected by the novel stencils.

Fig. 9 and Fig. 10 illustrate another embodiment of the invention wherein the stencil is also used to apply decorative designs to the fingernail. Fig. 9 is a plan view of the fingertip with the decorative stencil in place and Fig. 10 is the same fingertip after coating the fingernail and removal of the stencil of Fig. 9.

In the embodiment of the invention illustrated in Figs. 1 to 8, the stencil consists of a forward projecting portion 1, integral side portions 2 and 3 and a rear portion. The cutout portion of the stencil is the approximate size of the portion of the finger covered by the nail.

The stencil has an adhesive on the underside of at least the side portions 2 and 3 and preferably also under the forward portion 1. Fig. 2 illustrates the protective cover 5 for the adhesive being peeled from the underside of the stencil starting at the forward position 1. The rear portion 4 does not require any adhesive since the stencil is held firmly in place by side portions 2 and 3.

After removal of the protective cover 5 the stencil is ready to be applied to a finger 6 ready ing a fingernail 8 and a cuticle 9 as shown in Fig. 3. To position the stencil on the finger, the forward portion 1 of the stencil is placed beneath the forward end of the fingernail 8 so that the fingernail rests upon the projecting portion of the end of the stencil. The integral side portions 2 and 3 and the rear portion 4 are positioned to cover the skin surrounding the fingernail 8

and the cuticle 9, respectively without overlapping the fingernail. The stencil is held in position by the adhesive on the underside of the side portions 2 and 3 by pressing the side portions against the finger 6. The stencil can be removed from the finger by a gentle pull on the side portions 2 and 3.

In Fig. 5 which is a side view of finger 6 with the stencil in place, the fingernail 8 overlaps the forward projecting portion 1 of the stencil and side portion 3 covers the skin surrounding the fingernail. In Fig. 6 which is a cross-section of the finger 6 as shown in Fig. 5, the fingernail 8 overlaps the forward portion 1 and the cuticle 9 is covered by the rear portion 4 of the stencil. Fig. 7 which is a cross-section of Fig. 4 along the line 7-7 shows how the side portions 2 and 3 protect the skin of finger 6 from the coating liquid when it is applied to fingernail 8.

When the stencils are so positioned on the fingers, as shown in Fig. 8, the fingernail 8 can be treated with liquids as desired without also treating the cuticles and the surrounding skin. For example, liquid nail polish can be applied to the fingernails with a brush or any other suitable means and because of the protection afforded by the stencils the cuticle and the skin about the fingernail will not be coated and the coatings will be evenly distributed over the

fingernails.

Figs. 9 and 10 illustrate another embodiment of the invention in which the stencil is used for decorative purposes in addition to its protective purposes. In Fig. 9 the stencil has been positioned on finger 6 as before with the projecting forward portion 1 under the fingernail 8, the side portions 2 and 3 protecting the skin about the fingernail and the rear portion 4 covering the cuticle. About midway of integral sides 2 and 3 there is a narrow band 10 connecting the said sides. When the liquid coating is applied to the fingernail, the portion of the fingernail under band 10

is not coated. After the stencil has been removed from the finger as in Fig. 10, the fingernail is completely coated except for a narrow decorative stripe 11.

The stencil is preferably made of paper because it is inexpensive and can economically be discarded after one application of the liquid coating agent. However, it may be made of other materials, such as celluloid or plastic.

Various modifications of the stencil of the invention may be made without departing from the spirit or scope thereof and it is to be understood that the invention is to be limited only as defined in the appended claims.

### I Claim:

- 1. A nail stencil for applying liquids to human nails while protecting the cuticle and surrounding skin from the liquid which comprises a projecting portion at the forward end of the stencil to extend under the end of the nail, integral side portions which extend over the skin, a rear portion to cover the cuticle and means to hold the stencil in position.
- 2, A nail stencil for applying liquids to human nails while protecting the cuticle and surrounding skin from the liquid which comprises a projecting portion at the forward end of the stencil to extend under the nail, integral side portions which extend over the skin, a rear portion to cover the cuticle and means on at least the side portions for holding the stencil in position.
- 3. A nail stencil for applying liquids to human nails while protecting the cuticle and surrounding skin from the liquid which comprises a projecting portion at the forward end of the stencil to extend under the nail, integral side portions which extend over the surrounding skin to protect

it from the liquid and which extend over the fingernail to form decorative designs, a rear portion to cover the cuticle and means for holding the stencil in position.

- 4. A nail stencil for applying liquids to human nails while protecting the cuticle and surrounding skin from the liquid which comprises a projecting portion at the forward end of the stencil to extend under the end of the nail, integral side portions which extend over the skin, a rear portion to cover the cuticle and an adhesive on the underside of at least the side portions of the stencil for holding it in place.
- 5. A nail stencil substantially as herein before described with reference to the accompanying drawings.

Being duly sworn, I, Ben Dinerstein depose and say that I am a citizen of the United States of America residing at Brooklyn, County of Kings, State of New York; that I have read the foregoing specification and claims and I verily believe I am the original, first, and sole inventor of the invention or discovery in Stencil described and claimed therein; that I do not know and do not believe that this invention was ever known or used before my invention or discovery thereof, or patented or described in any printed publication in any country before my invention or discovery thereof, or more than one year prior to this application, or in public use or on sale in the United States for more than one year prior to this application; that this invention or discovery has not been patented in any country foreign to the United States on an application filed by me or my legal representatives or assigns more than twelve months before this application; and that no application for patent on this invention or discovery has been filed by me or my representatives or assigns in any country foreign to the United States, except as follows: None.

And I hereby appoint Hammond & Littell, of 350 Madison Avenue, New York 17, New York Registration No. 11,977, my attorney or agent with full power of substitution and revocation, to prosecute this application and to transact all business in the Patent Office connected therewith.

Wherefore I pray that Letters Patent be granted to me for the invention or discovery described and claimed in the foregoing specification and claims, and I hereby subscribe my name to the foregoing specification and claims, oath, power of attorney, and this petition, this 25th day of January, 1963.

Inventor /s/ Ben Dinerstein
Post Office Address 80 Lenox Road
Brooklyn 26, New York

County of New York )
State of New York )ss.:

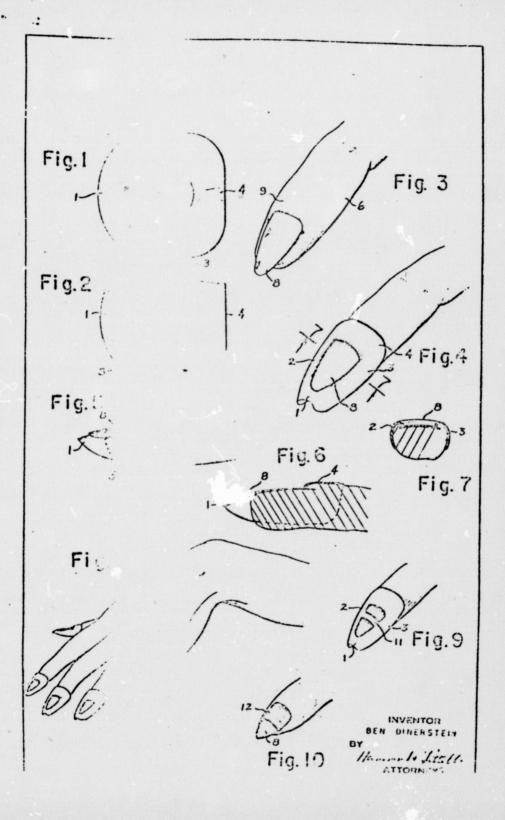
Before me personally appeared Ben Dinerstein, to me known to be the person described in the above application for patent, who signed the foregoing instrument in my presence, and made oath before me to the allegations set forth therein as being under oath, on the day and year aforesaid.

/s/ Leila Clark Notary Public, State of New York No. 30-0650875 Qualified in Nassau County Commission Expires March 30, 1963

[SEAL]

### Diagram

(See Opposite 🕞)





## Exhibit G Annexed to Affidavit of M. C. Silberberg Patent No. 3,382,878

(See Opposite 😭)

1

SHELDING DEVICE FOR NAIL-HARDENING COMPOSITIONS COMPUSITIONS

Ben Diacrstein, 40 E. 9th St.,
New York, N.Y. 16003

Filed July 29, 1964, Ser. No. 385,962

I Claim, (Cl. 132—88.5)

This invention relates to a novel device adapted for use in applying liquid nail-hardening compositions to human fincernails.

Women commonly use liquid nail-hardening compositions to harden the forward portion of their fingernails, usually referred to as the "white tips." Some of these liquid compositions contain a substantial amount of formaldebyde and are applied by means of a small brush or the like. In some people the cuticle and soft tissue surrounding the fingernails are very sensitive to irritation by formaldehyde, and such persons must take meticulous care not to contact the cuticle and soft tissue with the 96 formaldehyde-containing nail-hardening composition. In order to prevent any possibility of irritation of the cutiele and soft tissue, the Food and Drug Administration requires formaldehyde containing nail-hardening compositions to be sold together with a suitable stencil or shield 25 which prevents the liquid nail-hardening composition from coming into contact with the cuticle and soft tissue.

It is an object of the present invention to provide a steneil or shield which exposes the white tip of the nail for coating with a formaldehyde-containing liquid nail- 20 hardening composition while protecting the cuticle and surrounding skin against contact with the liquid composition.

It is another object of the invention to provide a novel nail stencil or shield which enables one rapidly to without contacting the cuticle and surrounding skin with the liquids.

These and other objects and advantages of the invention will become apparent from the following detailed description.

The novel nail stencil or shield of the present invention for applying formaldehyde-containing liquids to hunear nails while protecting the cuticle and surrounding skin from the liquid is consisted of a flat, pliable sheet material having a projecting forward end which is placed 45 under the white tip of the nail, integral side portions which extend over the side edges of the nail and the skin adjacent to the side edges of the nail, a rear portion to cover the end portion of the nail, the cuticle and the skin to the rear of it, adhesive means on one face of the shield 50 for holding it in position on the finger, a transverse slit approximately one third the distance from the forward edge of the steneil, and an arched curvilinear aperture rearward of said transverse slit.

Referring now to the drawings:

FIG. I is a plan view of the shielding device of the ent invention.

FIG. 2 is a partial plan view of the shielding device of FIG. 1 in which the protecting backing is partially pulled away

FIG. 3 illustrates a finger with the shielding device of 60

the invention placed in position about the fingernail.

In the embodiment of the invention illustrated in the figures, the shielding device consists of a forward projection portion 1, integral side portions 2 and 3 and a rear portion 4, a transverse, substantially linear slit 5, and a forwardly arched curvilinear slit 6 forward of the linear dit 5

The shielding device has an adhesive on the underside of at Jeast the side portleas 2 and 3 and preferably also

under the rear portion 4. FIG. 2 illustrates the protective cover 7, for the adhesive being pecled from the underside of the stencil starting at the rearward portion 4. The rear portion 4 does not necessarily require any adhesive since the steneil may be held firmly in place by side portions 2 and 3

After removal of the protective cover 7, the stencil is ready to be applied to a finger 8 having a fingernail with a white tip 9 and a cuticle 10. To position the shielding device, the white tip 9 of the fingernail is slipped through the transverse slit 5 so that the forward portion 1 of the shielding device is beneath the white tip 9 of the fingernail and the center of the fingernail is exposed through aperture 6. The integral side portions 2 and 3 15 and the rear portion 4 are positioned to cover the remainder of the fingernail, the skin surrounding the finger-nail and the cuticle 10. The shielding device is held in position by the adhesive on the under side of side portions 2 and 3 and rear portion 4 by pressing the said portion against the finger 8. The shielding device can be easily removed from the finger after application of the liquid nail hardener by a gentle pull on the side portions 2 and 3 or rearward portion 4.

When the shielding devices are positioned on the fingers as shown in FIG. 3, the white tips 3 and the center portion of the fingernail can be treated with liquids as desired without contacting the cuticles and the surrounding soft

tissuc.

The shielding device is preferably made of paper because it is inexpensive and can economically be discarded after one application of the liquid nail-hardening conposition However, it may be made of other materials, such as celluoid or plastic.

Various modifications of the shielding device of the incoat fingernails with liquids comprising formaldehyde 35 vention may be made without departing from the spirit or score thereof, and it is to be understood that the invention is to be limited only as defined in the appended claims

I claim:

1. A nail-shielding device of unitary construction for use in applying a formaldehyde-containing liquid nail-hardening composition to human fingernails while protecting the enticle and surrounding skin tissue from contact with said liquid composition, said nail-shielding device consisting of a main body of flat, pliable, liquid-impermeable sheet material having a projecting forward portion and a rearward portion; a trans erse slit in said sheet material at approximately one-third the distance from the forward edge of said forward portion to the rear edge of said rearward portion slit means including a transverse slit having a length adapted to accommodate the width of a human fingernail; means for exposing a portion of the nail center, said means comprising a U-shaped aperture in said sheet material extending rearward from said transverse slit, the 55 width and length of said aperture being such that said aperture is adopted to expose only the center portion of a human (ingernail; and adhesive means on the underside of said shielding device for holding it in place on the finger.

#### References Cited HINITED STATES DATESTO

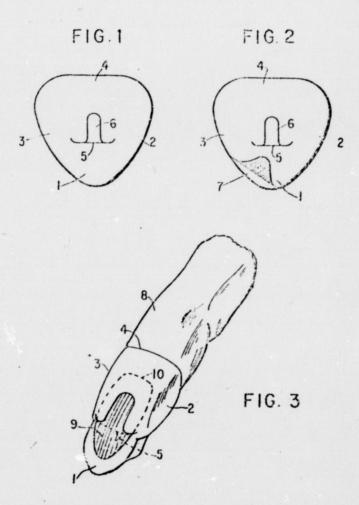
		0	OTHER PURE	
	2,031,225	2/1936	O'Donneli	132-88.5
	2,323,145	6/1943	Mabry	132-83.5
65	2,539,115	1/1951	Brachman	128-153
	3,245,418	4/1966	Dinerstein	132-38.5

LOUIS G. MANCENE, Primary Examiner.

G. E. Mc NEH I., Assistant Examiner,



SHIELDING DEVICE FOR MAIL-MARDENING COMPOSITIONS Filed July 20, 1964



Ha COLL INCOME



# Exhibit H Annexed to Affidavit of M. C. Silberberg Affidavit of C. Benjamin Dinerstein

### UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

State of New York ) County of New York ) ss.:

- C. Benjamin Dinerstein, being duly sworn, deposes and says:
- 1. I am one of the defendants in this action and am executing this affidavit in accordance with a provision in the order of United States District Court Judge Weinfeld dated February 14, 1964.
- 2. On January 25, 1963 I filed an application for a United States Patent through my patent attorneys, which application received a United States Patent Office filing receipt on February 5, 1963 indicating that Serial No. 256417, Division 25, had been assigned to such application. Subsequently the identical application was filed through patent counsel in the Swiss Patent Office on March 30, 1963, which application had been assigned: No. 4081-1963.
- 3. Neither I nor my agents, servants, employees and attorneys, nor any other person in participation with me took any further steps in connection with said patent application. There have been no agreements or negotiations with regard to the transfer of such patent application.

C. Benjamin Dinerstein

(Sworn to April 2, 1964.)

### Endorsed Order of Judge Gagliardi Dated May 1, 1973

#### Endorsement

The defendant moves pursuant to Rule 60(b) Fed. R. Civ. P. for an order modifying an interlocutory judgment entered on January 4, 1972 on the grounds of newly discovered evidence. The affidavit in support of the motion recites what will be proved by this new evidence; however, it does not reveal the nature of this evidence. Thus we are told that, "newly discovered evidence clearly demonstrates that the nail protec r shield which was the subject of a patent application \* \* \* was unpatentable and in the public domain" and that, "the formulation of Mavala Scientifique and Living Nail are \* \* \* quantitatively and qualitatively different." We are not told how these and other allegations will be proved; nor are we told why the alleged new evidence (which we surmise to be in the nature of expert testimony and public records) could not have been discovered prior to the making of this motion.

Upon review of the defendant's papers, we are compelled to agree with the plaintiff's claim that this motion is merely a "frivolous attempt \* \* \* to delay" the conclusion of this litigation. Accordingly, the motion is denied.

So Ordered.

Lee Gagliardi U.S.D.J.

Dated: New York, N.Y. May 1, 1973

### Plaintiffs' Interrogatories Dated March 14, 1973

### UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

To: Bendyne, Ltd. and C. Benjamin Dinerstein c/o Weil, Gotshal & Manges 767 Fifth Avenue New York, New York 10022

#### SIRS:

PLEASE TAKE NOTICE, that pursuant to the provisions of Rules 33 and 69 of the Federal Rules of Civil Procedure, plaintiff hereby propounds and serves the following interrogatories which you are required to answer separately and fully in writing and under oath and serve a copy of your answers upon the undersigned on or before April 18, 1973.

- 1. (a) Set forth the state of incorporation of defendant Bendyne and specify each foreign country under whose laws it is authorized to transact business.
- (b) List each officer of defendant Bendyne since January 1964.
- 2. Set forth the name of each corporation and/or company other than defendant Bendyne organized under the laws of any state of the United States or any foreign country which since January 1964 has utilized "Bendyne" in its corporate or company name and in which defendant Dinerstein and/or Bendyne own any interests.

### Plaintiffs' Interrogat

- 3. With respect to each corporation of entity identified in 2 above, set forth the (a) date of its incorporation or formation; (b) the place of its incorporation or organization; (c) the name of each of its officers; (d) a description of its business and (e) the percentage of outstanding stock owned by (i) defendant Bendyne and/or (ii) defendant Dinerstein.
- 4. Set forth the name of each corporation and/or company other than those identified in answer to 2 above organized under the laws of any state of the United States or any foreign country in which defendants Dinerstein or Bendyne own at least 10% of the outstanding common stock including but not limited to Bendol, Inc., C-B Sales Co. and Benesco, Inc.
- 5. With respect to each corporation or company identified in 4 above, set forth (a) date of its incorporation or formation; (b) the place of its incorporation or organization; (c) the names of each of its officers; (d) a description of its business; and (e) the percentage of outstanding stock owned by (i) defendant Bendyne and/or (ii) defendant Dinerstein.
- 6. Identify each office maintained by defendant Bendyne for the transaction of business since January 1, 1964, specifying with respect to each whether owned or rented, and if rented, for each lease since January 1, 1964 set forth (a) the identity of the lessor; (b) the identity of the lessee; (c) the duration of the lease; (d) the yearly rent; and (e) the square footage and number of rooms rented.
- 7. List each corporation and/or company identified in answer to 2 and/or 4 above which has since January 1,

1964 transacted any business at any address in answer to 6 above.

- 8. (a) With respect to each corporation or co. Beny identified in answer to 7 above, state whether it has at any time since January 1964 shared offices with defendant Bendyne or whether it has occupied separately designated office space at the address.
- (b) If separately designated space was occupied set forth for each such corporation and/or company:
  - (i) the square footage and number of rooms occupied;
  - (ii) whether the space was rented pursuant to the provisions of a lease other than that identified in answer to 6 above and if so set forth:
    - A. the identity of the lessor;
    - B. the identity c the lessee;
    - C. the duration of the lease;
    - D. the amount of yearly rent;
    - E. the square foctage and number of rooms rented.
- (c) If office space was shared, set forth the method by which rent was apportioned between defendant Bendyne and any other corporation or company including (i) the amount paid by each company; and (ii) the basis for apportionment thereof.
- 10. (a) Identify each person employed by defendant Bendyne since January 1964 and with respect to each set forth (i) the dates of their employment; (ii) a description

of the work performed by them; and (iii) the monthly salary paid to them.

- (b) Did any person identified in response to 10(a) above perform services during the period January 1964 to present for any corporation or company identified in answer to 2 and/or 3 above.
- (c) If the answer to 10(b) is anything but an unqualified negative, set forth with respect to each such person, the method by which their salary was apportioned between defendant Bendyne and any other corporation or company including the (i) amount paid by each; and (ii) basis for apportionment thereof.
- 11. (a) Identify each insurance policy paid for by defendant Bendyne since January 1, 1964 including (i) type of Policy; (ii) the identity of the insured(s); (iii) the annual premium for each year since 1964; (iv) the name of the insurance carrier; and (v) the name of the broker through whom the policy was placed.
- (b) Did any policy described in answer to 11(a) provide insurance for persons employed by or for property utilized by any corporation or company identified in answer to 2 and/or 4 above.
- (c) If the answer to 11(a) is anything but an unqualified negative (i) identify each such policy; and (ii) set forth the method by which the premiums were apportioned between the companies including:
  - A. the amount paid by each; and
  - B. the basis for apportionment thereof.
- 12. (a) State whether charges for (i) telephone; (ii) cleaning services; (iii) electricity; and (iv) trucking and

shipping, were at any time since January 1964 apportioned between defendant Bendyne and any corporation or company identified in answer to 2 and/or 4 above.

- (b) As to each answer to 12(i)-(iv) above which is anything but an unqualified negative, set forth for each year since January 1964:
  - (i) the identity of each company or corporation between whom such charges were apportioned;
    - (ii) the total amount of charges for the service;
  - (iii) the amount charged to defendant Bendyne and any corporation or company identified in 2 or 4 above, and
    - (iv) the basis for apportionment thereof.
- 13. (a) Set forth all companies, persons or entities to whom the following sums were paid for "advertising costs" as reflected in defendant Bendyne's books:
  - (i) 1964—\$49,826.00
  - (ii) 1965—\$58,035.00
  - (iii) 1966-\$11,386.00
  - (iv) 1967-\$10,191.00
  - (v) 1968-\$19,683.00
  - (vi) 1969-\$11,462.00
  - (vii) 1970-\$5,020.00
  - (viii) 1971-\$4,569.00
  - (ix) 1972—\$14,507.00
- (b) Did any company, person or entity identified in response to 13(a) provide services since January 1964 to any

corporation or company identified in answer to 2 and/or 4 above.

- (c) If the answer to 13(b) is anything but an unqualified negative, set forth for each year whether the charges for "advertising" were apportioned between defendant Benyne and any company identified in answer to 2 and/or 4 above and if so, set forth
  - (i) the amount paid by each company; and
  - (ii) the basis for apportionment thereof.
- 14. (a) Did defendant Bendyne maintain an account with American Express and n so list all account numbers.
- (b) If defendant Bendyne did not maintain in American Express account in its own name identify the account numbers pursuant to which payments of \$10,568.27 to American Express were made during the period January 1964 to May 1972 as reflected on defendant Bendyne's books including, but not limited to:
  - (i) the number of the account; and
  - (ii) the name of the person or company in whose name the account was maintained.
- 15. (a) Since January 1964 has the product "Living Nail" been sold by any company other than defendant Bendyne?
- (b) If the answer to 15(a) is anything but an unqualified negative, set forth for each company which sold "Living Nail":
  - (i) its name and address;
  - (ii) the date such sales commence.
  - (iii) the dollar amount of its sales of "Living Nail" for each year since 1964.

- 16. (a) Since January 1964, has defendant Bendyne manufactured and/or sold any product other than "Living Nail".
- (b) If the answer to 16(a) is anything but an unqualified negative, set forth for each such product:
  - (i) its trade name;
  - (ii) the dates its sale commenced;
  - (iii) a description of the product; and
  - (iv) the dollar amount of its sales for each year since 1964.
- 17. (a) Has any corporation or company identified in answer to 2 and/or 4 above manufactured and/or sold or licensed others to manufacture and/or sell a nail hardening product since January 1964 under a name other than "Living Nail".
- (b) If the answer to 17(a) is anything but an unqualified negative set forth with respect to each such company:
  - (i) the trade name of each such product;
  - (ii) the dates of its sale;
  - (iii) A description of the product;
  - (iv) the dollar amount of the sales for each year since 1964; and
  - (v) whether any such product utilized a nail protector shield which is claimed under U.S. Pater.ts 3,245,418 and 3,382,878.
- 18. (a) Have defendants Bendyne or Dinerstein licensed others to manufacture and produce nail protector shields under U.S. Patent Nos. 3,245,418 and 3,382,878.

- (b) If the answer to 18(a) is anything but an unqualified negative, set forth
  - (i) the identity of the licensee;
  - (ii) the identity of the licensor;
  - (iii) the date of the license;
  - (iv) whether the license was oral or in writing; and
  - (v) the amount paid in license fees for each year since January 1964.
- 19. (a) Has defendant Bendyne at all times since January 1964 manufactured and/or synthesized the "Living Nail" liquid nail hardener sold by it or any company identified in response to 15 above.
- (b) If the answer to 19(a) is anything but an unqualified negative, set forth
  - (i) the amount of formaldehyde purchased by defendant Bendyne since January 1964;
  - (ii) the name and address of the company from whom such formaldehyde was purchased; and
    - (iii) the amount paid therefor.
- (c) If the liquid nail hardener was manufactured or synthesized by a company or corporation other than defendant Bendyne set forth for each such company
  - (i) the name and address of each such corporation;
  - (ii) the quantity of liquid nail hardener purchased by defendant for each year since January 1964; and

- (iii) the amount paid by Bendyne for purchase of the liquid nail hardener for each year since January 1964.
- 20. (a) Did defendant Bendyne at all times since January 1964 bottle the "Living Nail" sold by it or any company identified in response to 15 above.
- (b) If the answer to 20(a) is anything but an unqualified negative, set forth
  - (i) the number of bottles purchased by defendant Bendyne since January 1964;
  - (ii) the name and address of the company from whom purchased; and
    - (iii) the amount paid therefor.
- (c) If "Living Nail" was bottled by a company other than defendant Bendyne, set forth for each such company
  - (i) the name and address;
  - (ii) the total number of units bottled in each year since January 1, 1964; and
  - (iii) the amount paid by defendant Bendyne for bottling in each year since January 1964.
- 21. (a) Did defendant Bendyne at all times since January 1964 package the "Living Nail" sold by it or any company identified in response to 15 above.
- (b) If the answer to 21(a) is anything but an unqualified negative, set forth
  - (i) the number of units packaging purchased by defendant Bendyne since January 1964;

- (ii) the name and address of the company from whom purchased; and
  - (iii) the amount paid therefor.
- (c) If "Living Nail" was packaged by a company other than defendant Bendyne, set forth for each such company
  - (i) the name and address;
  - (ii) the total number of units packaged in each year since January 1, 1964; and
  - (iii) the amount paid by defendant Bendyne for packaging in each year since January 1964.
- 22. (a) Did defendant Bendyne at all times since January 1964 manufacture the nail protector shields sold with "Living Nail".
- (b) If the nail protector shields sold with "Living Nail" at any time since January 1964 were manufactured by a company other than defendant Bendyne, set forth
  - (i) the name and address of the company;
  - (ii) the total number of shields purchased in each year since 1964; and
  - (iii) the amount paid by defendant Bendyne for shields in each year since January 1964.
- 23. Set forth in complete and precise detail the basis of the following payments and/or transactions to the parties indicated which are reflected in the defendant Bendyne's books including (a) the nature of the obligation; (b) the date the obligation was incurred; (c) a description of each

and every document which relates in any way to the obligation:

- (i) a payment of \$3,500. to C-B Sales—May 31, 1964;
- (ii) a payment of \$13,815. to C-B Sales—May 31, 1964;
- (iii) a payment of \$16,000. to Ben Sackheim, Inc.
  —May 31, 1963;
- (iv) a transfer of \$15,000. in capital stock to Macquire & Co.—May 31, 1964;
- (v) a payment of \$10,586. to C-B Sales—May 31, 1964;
- (vi) a payment of \$3,500. to C-B Sales—May 31, 1964;
- (vii) payments totalling \$1,007. to defendant Dinerstein in 1968;
- (viii) payments totalling \$955. to defendant Dinerstein in 1969;
- (ix) payments totalling \$2,000. "re Benesco"— January 30, 1968;
- (x) payments totalling \$860. to defendant Dinerstein in 1970;
- (xi) payments totalling \$5,177. to defendant Dinerstein in 1971;
- (xii) a payment of \$2,000.—"Krin & Balon (Benesco)"—dated April 29, 1968.
- 24. With respect to monthly payments of \$437.00 to Engleman & Co. during the period April 1, 1971 to Septem-

ber, 1972, set forth in complete and precise detail the nature of the expenditures including (a) the address and complete description of any real property rented; and (b) nature of the business for which it was used.

25. With respect to the \$1,107. in payments for automobile insurance, set forth (a) identification of the vehicle(s) insured; and (b) nature of the business for which it was used.

Dated: New York, New York March 14, 1973.

Yours, etc.,

Golenbock and Barell Attorneys for Plaintiffs 60 East 42nd Street New York, New York 10017

# Notice of Motion Dated June 5, 1973

### UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

SAME TITLE

SIRS:

PLEASE TAKE NOTICE, that upon the annexed affidavit of Michael C. Silberberg, Esq., the undersigned will move this Court, before the Honorable Lee Gagliardi, on Tuesday, June 19, 1973, at 4:00 P.M., United States Courthouse, Foley Square, New York, New York, for an order in aid of effectuation of plaintiffs' interlocutory judgment:

- (a) pursuant to Rule 66 of Federal Rules of Civil Procedure, directing the appointment of a receiver for defendant Bendyne, Ltd., pending the entry of final judgment in this action; and,
- (b) compelling defendants C. Benjamin Dinerstein and Bendyne, Ltd. pursuant to Rule 37(a) and (d) of the Federal Rules of Civil Procedure, to answer within ten (10) days, the written interrogatories propounded by plaintiffs on March 14, 1973 which defendants willfully have failed and refused to answer together with reasonable expenses including attorneys' fees incurred by reason of defendants' willfull and unjustified refusal to serve answers to the interrogatories and for such other and further relief as the Court may deem just and proper.

Dated: New York, New York June 5, 1973

Yours, etc.

To:

Weil, Gotshal and Manges Attorneys for Defendants 767 Fifth Avenue New York, New York (212) 758-7800 Golenbock and Barell Attorneys for Plaintiffs 60 East 42nd Street New York, New York (212) 986-3300

### Affidavit of Michael C. Silberberg in Support of Foregoing Motion

#### UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

State of New York ) County of New York ) ss.:

- MICHAEL C. SILBERBERG, being duly sworn, deposes and says:
- 1. I am an attorney associated with the firm of Golenbock and Barell, attorneys for the plaintiffs herein and am fully familiar with the facts of this action.
- 2. I make this affidavit in support of plaintiffs' motion for an order in aid of effectuation of plaintiffs' interlocutory judgment,
- (a) pursuant to Rule 66 of the Federal Rules of Civil Procedure, directing the appointment of a receiver to operate and conduct the business of Bendyne, Ltd., pending the entry of a final judgment in this action, and
- (b) compelling defendants C. Benjamin Dinerstein and Bendyne, Ltd., pursuant to Federal Rules of Civil Procedure, Rule 37(a) and (d), to answer, within ten (10) days, the written interrogatories propounded on March 14, 1973, which defendants have willfully refused to answer, together with the reasonable expenses of this motion, including attorneys' fees, incurred by reason of defendants' willful and unjustified refusal to serve answers to the interrogatories.

- 3. Succinctly stated, a receiver to properly manage the defendant corporation, Bendyne, Ltd., is urgently needed in order to prevent the complete and total frustration of the interlocutory judgment in this action which requires defendants to account to plaintiff Tinsley for all profits from the sale of "Living Nail" and its shield protector and to prevent the continued dissipation and diversion of such income and profits which constitute trust monies held by defendants for plaintiff Tinsley's benefit.
- (a) As discussed more fully below, defendants have to date, frustrated the accounting by (i) failing and refusing to maintain and produce adequate records of income and profits derived from sales of "Living Nail" in violation of Judge Weinfeld's preliminary injunction and the terms of the interlocutory judgment; (ii) diverting substantial profits of defendant Bendyne, Ltd., for the personal expenses of defendant Dinerstein and to other corporations which he controls, and (iii) impeding plaintiffs in their efforts to unravel defendants maze of diversion and self-dealing including the refusal to answer interrogatories propounded in March, 1973.
- (b) Unless a receiver is appointed immediately to take charge of the affairs of the corporation, pending final judgment and defendants are directed to answer the interrogatories forthwith, defendants will continue with impunity to frustrate the judgment of the Court and will indefinitely delay and impede the effectuation of the relief decreed after trial.

T.

# Prior Proceedings and Description of Parties

4. This action initially was commenced on May 3, 1963, by Frederick E. Tinsley ("Tinsley") and Anstalt Dynos, S.A. ("Dynos"), Tinsley's Lichtenstein corporation

against defendants C. Benjamin Dinerstein ("Dinerstein"), and C-B Sales Co. ("C-B Sales"), one of Dinerstein's companies, and derivatively against Mavala, Inc. ("Mavala"), a New York corporation which was formed by Tinsley and Dinerstein to carry out their joint venture to market cosmetic products in the United States and in which each held a 50% stock interest.

- 5. The complaint alleged that Dinerstein, in breach of his fiduciary duties arising out of the joint venture, wrongfully appropriated for himself and his own company, the patent rights to a nail protector shield which was developed for Mavala so that it could secure the approval of the Food and Drug Administration to distribute a nail hardening product known as "Scientifique" in the United States. Subsequent to the filing of the complaint, plaintiffs ascertained that Dinerstein had diverted the nail protector shield to Bendyne, Ltd., ("Bendyne"), a Delaware Corporation which Dinerstein had formed subsequent to the commencement of the action, and through which he was distributing a nail hardener similar in substance to "Scientifique" under the name "Living Nail". Accordingly, plaintiffs amended the complaint to name Bendyne, Ltd. as party defendant, and in the complaint sought an accounting of profits from the sale of "Scientifique" and "Living Nail", and an injunction against the transfer of any interest in the patent application or against revealing the formula or its component parts to any person. Tinsley and Dynos also asserted a claim of \$80,676.00 for goods sold and delivered to Mavala.
- 6. A preliminary injunction (attached hereto as Exhibit "A") was granted by District Judge Edward Weinfeld on January 30, 1964. The basis for the injunction was that plaintiff had made a substantial showing that Dinerstein

had breached fiduciary obligations owed to Tinsley and to Mavala by diverting the nail protector shield to his own corporation, Bendyne. Judge Weinfeld directed, *inter alia*, that defendants Dinerstein and Bendyne:

"[K]eep accurate accounts and records of all sales of the product "Living Nail" and the protector shield and all income derived from such sales, such records to be kept in sufficient form to permit a ready accounting of all such transactions."

- 7. Upon full trial of this action in November, 1970, District Court Judge Solomon\* found that Dinerstein, in disregard of his fiduciary obligations to Mavala, and in disregard of his joint venture obligations to Tinsley, had diverted to himself and his corporation not only the patent rights in the nail protector shield, but also the profits which would have accrued from the sales of "Scientifique" in the United States. Judge Solomon sustained plaintiffs' claim for the profits realized by defendants from the sales of "Living Nail", "Scientifique", and the nail protector shield and directed defendants Dinerstein, Bendyne and C-B Sales to account to plaintiff for all such profits. Thus, a constructive trust was by operation of law impressed upon the profits of "Living Nail" for the benefit of plaintiff Tinsley. Tinsley was also awarded an undivided one-half interest in all patent rights to the nail protector shield. However, by letter dated December 31, 1971 (Exhibit "B") Judge Solomon requested plaintiffs to refrain from enforcing that provision of the interlocutory decree until the entry of final judgment.
- 8. An interlocutory judgment embodying the directives of Judge Solomon was entered on January 4, 1972 (Exhibit

<sup>\*</sup> Chief Judge, District of Oregon, who tried the case by designation in this district.

"C"). Under the terms of the decree, defendants were required to immediately "\* \* Produce for inspection and copying by plaintiffs, all records and accounts for sales of the product "Living Nail" and the shield protector and all income derived from such sales, which records they were required to maintain pursuant to the order of District Judge Edward Weinfeld dated February 14, 1964." The interlocutory judgment also established a procedure whereby the parties, subsequent to production of the required records, were directed to attempt to agree on the amounts due under the accounting, and failing such agreement, the judgment provided for referral to a Special Master. As hereinafter more fully discussed, plaintiff has attempted to comply with such procedure but compliance has been rendered impossible by defendants' willful failure and refusal to maintain and produce the specified records as directed by both Judge Weinfeld and Judge Solomon.

#### II.

### The Accounting

- 9. Plaintiffs have exhausted all attempts to obtain voluntary compliance by the defendants with the provisions of the interlocutory judgment directing an accounting. Numerous demands have been made on defendants' counsel, various motions have been brought and conferences with defendants' attorneys and the court have been held to compel production of records. As part of their efforts to obstruct and impede the completion of the accounting, defendants brought on a motion to expunge the accounting provisions from the interlocutory judgment which this Court in its recent opinion denying the motion characterized as a "frivolous attempt to delay the conclusion of this litigation."
- 10. The records heretofore produced by defendants, in which they claim a net operating loss of approximately

\$57,000 since 1964 upon net sales of \$490,270,000 are on their face palpably incomplete and indeed raise more questions than they answer. These records, coupled with other investigations conducted by plaintiffs' attorneys and accountants, David Berdon & Co., indicate that:

- (a) Defendant has not reported all sales of "Living Nail" and appears to have diverted sales to other corporations and companies controlled by defendant Dinerstein, and
- (b) Dinerstein has, in violation of the terms of the interlocutory judgment and preliminary injunction and in breach of his duties as constructive trustee, charged operating expenses of other corporations which he controls to Bendyne and additionally has diverted to his own use substantial assets of Bendyne.
- 11. Bendyne, Ltd. is one of a complex of corporations controlled by defendant Dinerstein which operate from the same suite of offices. Analysis of the books and records of Bendyne reveals a maze of inter-company transactions between Bendyne and these other corporations and self-dealing between Dinerstein and Bendyne. All attempts by plaintiffs to unravel this maze have been thwarted by defendants, who have refused to make the necessary records available and who have failed to answer interrogatories which merely seek disclosure of information necessary for a coherent analysis of the operations of Bendyne, Ltd. so as to ascertain the amount of actual profits derived from "Living Nail".
- 12. Plaintiffs are not alone in their inability to unravel this maze absent the intervention of the court. In a similar proceeding brought against Dinerstein in State court by his brother Charles to dissolve their partnership in defendant C-B Sales, a court-appointed receiver has for several

years been attempting to unravel a similar pattern of intercompany transactions and has been faced with deliberate and willful attempts by Dinerstein to impede and prevent completion of the accounting. In that action Dinerstein has, inter alia, been held in contempt and ordered committed to jail (Exhibit D) by reason of his continuous and willful refusal to comply with orders of the Court requiring him to produce records and his attempts to harass and interfere with the receiver, including attempts to have the receiver arrested and evicted from the premises. (See Dinerstein v. Dinerstein, New York State Supreme Court, New York County, Index No. 16055/66, hereinafter referred to as the "State Court proceeding").

- A. Efforts of Plaintiffs to Compel Production of the Books and Records Necessary to Complete the Accounting Ordered.
- 13. Initially, defendants wilfully refused to comply with directives of the interlocutory judgment that they produce for inspection all records and accounts of all sales and all profits derived from sales of "Living Nail" and the shield protector, despite numerous requests of plaintiffs that they do so. Accordingly, plaintiffs in February 1972 were compelled to seek an order holding defendants in contempt. This motion was withdrawn without prejudice on June 2, 1972 upon defendants' representation that they would produce the books within a week.
- 14. The records thereafter produced by defendants were incomprehensible; defendants had masked over identification of many if not most entries therein, thus reducing the documents to nothing more than a jumble of numbers. Defendants sought to justify such masking with a feigned claim of "confidentiality" and again plaintiff was required

to seek relief from the Court. On September 1, 1972 the Court directed defendants to unmask their records and produce them within ten (10) days. Such relief was sought, and presumably granted, with the expectation that the records "sans" masking would be comprehensible and provide basis for the accounting. However, this has not been the case.

### B. Analysis of the Records Produced.

- 15. The books and records of Bendyne produced by defendants purport to show net sales of only \$490,000 for the nine years ending May 31, 1972 and a net operating loss of approximately \$57,000 for that period. These are as follows:
- (a) general ledgers and general journals for the fiscal years ending May 31, 1964 through May 31, 1971;
- (b) cash receipts books for the period July 1963 through September 1972;
- (c) cash disbursements books for the period August 1963 through September 1972;
- (d) purchase journal for the period from November 1963 through June 1972 and the months July and August 1972;
- (e) sales invoices dated from September 1963 through May 1972;
  - (f) subsidiary accounts payable ledgers; and
  - (g) subsidiary accounts receivable ledgers.
- 16. Analysis of the above-described records indicate that they are incomplete, contain critical omissions and apparent alterations and substantial and unexplained trans-

actions with Dinerstein and his other companies. For example, during the entire nine-year period ending May 1972, there is no entry reflecting the purchase of a single raw material utilized to manufacture "Living Nail" and no entries indicating where or how the company packaged or bottled its product. Information with respect to inventories was made available only for the close of the fiscal years ending 1965, 1966, 1971 and 1972. Some pages in the subsidiary accounts receivable and payable ledgers covering transactions over several years appear to have been rewritten.

- 17. Throughout most of the nine-year period ending May 1972, defendant Bendyne shared offices with Dinerstein's other corporations, such as C-B Sales Company, Bendyne Products, Inc., Bendol and Benesco each of which appears to have been engaged in the cosmetic business. There is no indication as to the manner in which services such as rent, telephone, insurance, etc. were apportioned between these companies and defendant Bendyne. such service charged to Bendyne, i.e.; advertisin;, which in some years has amounted to 50% of net sales, is on its face excessive and gives rise to the inference that defendant Bendyne incurred such charges on behalf of Dinerstein's other companies. When plaintiffs attempted to ascertain the basis of apportionment of these charges and an explanation of other questionable transactions through interrogatories, defendants willfully refused to answer them.
- 18. Dinerstein has by affidavit submitted in the State Court proceeding (Exhibit E) admitted to the existence of these inter-company dealings and thereby confirmed and reinforced plaintiffs' contention that certain obligations incurred by Dinerstein's other companies were improperly paid by Bendyne. The affidavit which was made by Dinerstein's

stein on behalf of Bendyne as a creditor of C-B Sales, claims that C-B Sales owes Bendyne money for payments improperly made by Bendyne for expenses properly chargeable to C-B Sales. Dinerstein further asserts that Bendyne paid two personal judgments rendered against him for activities related to C-B Sales and that Bendyne paid salaries to Dinerstein and his wife for services performed for C-B Sales. He also states that a \$3,000 loan taken by C-B Sales from the Bank of Commerce was paid for out of Bendyne's account when the receiver for C-B Sales refused to allow payments. Finally, he states that Bendyne paid C-B Sales' share of some expenses which should have been apportioned, including rent, utilities, Xerox services, fire and liability insurance, postage, messenger service and wines and liquors.

- 19. The above described books and records of Bendyne are replete with other unsubstantiated expenditures which appear to constitute diversion by defendant Dinerstein of Bendyne's assets for his own personal benefit. Defendants have willfully refused to answer plaintiff's interrogatories with respect to these transactions. These payments are as follows:
- (a) Checks in the amount of \$1,107 as payment for automobile insurance were issued and paid in 1971, even though Bendyne's records do not reflect that the company owns any automobiles. Analysis of the file in the State Court proceeding indicates that insurance payments by that company for Dinerstein's personal automobile, a Cadillac, were in 1970 claimed improper by the court-appointed receiver as personal expenses of Dinerstein. These insurance payments appeared on defendant Bendyne's books for the first time the following year.

- (b) Payments were also made to Sylvan Parking Company for automobile parking commencing in 1971. Sylvan operates a garage in the basement of Dinerstein's apartment building at 40 East Ninth Street. The file in the State Court proceeding indicates that such payments were made prior to 1971 by C-B Sales Co. and were claimed improper by the receiver as personal expenses of Dinerstein at that time.
- (c) Substantial expenditures charged to C-B Sales for wines and liquors were claimed by the receiver to be improper in the State Court proceeding. Thereafter, substantial expenditures for wines and liquors began to appear on the books of Bendyne.
- (d) Checks made payable to the Bank of Commerce, claimed as improper in the State Court proceeding, were found by the receiver to have been issued in repayment of loans Dinerstein obtained from the Bank for the purchase of his automobile, his son's education and his personal use. There are substantial unexplained entries in the books of Bendyne for payments made to the Bank of Commerce.
- · -(e) There are also payments of \$10,568.27 on the books of Bendyne to American Express Company without identification of the purpose and nature of the charges. American Express has informed me that Bendyne has never maintained an account with their company but that Dinerstein has at all relevant times maintained a personal account in his own name.
- (f) Monthly payments of \$437 to Engleman & Company from April 1, 1971 to September 1972 are unexplained in the books and records produced. Not unexpectedly, Engleman & Company manages the apartment building in which Dinerstein resides.

#### 112a

### Affidavit of Michael C. Silberberg

- (g) Numerous and unexplained entries in the books reveal repeated cash payments by Bendyne to defendant Dinerstein, even though Benjamin Dinerstein is prevented by the terms of the interlocutory judgment from deducting any salary for himself. In the State Court proceeding a similar pattern of payments resulted in the receiver claiming them to be improper payments for Dinerstein's personal benefit.
- 20. It also appears that the reported net sales of "Living Nail" are understated and that sales have either not been fully reported or a portion thereof have been accomplished through Dinerstein's other companies. In Exhibit F, Dinerstein himself admits that substantial quantities of "Living Nail" were sold by Bendyne to C-B Sales for resale by the latter company. These transactions are not reflected in the records produced. Additionally, the pattern of sales actually reflected in the books is erratic, with sales to certain customers ceasing in 1964 after entry of the preliminary injunction by Judge Weinfeld. Interrogatories seeking information as to sales of "Living Nail" by other companies have also been willfully ignored by defendants.

#### Ш

### Relief Sought

### A. Receivership

21. It is clear from the foregoing that Dinerstein has willfully delayed and impeded the accounting ordered by the Court and has, while claiming a net operating loss for Bendyne, been diverting substantial assets of that corporation for his own personal use and for the benefit of other corporations he controls. Accordingly, plaintiff seeks the appointment of a receiver to actively administer and op-

erate the business of Bendyne pending entry of final judgment in this action, so as to ensure the preservation of the profits of "Living Nail" and to ensure the swift completion of the accounting.

- 22. The urgent need for the receiver here is underscored by the tactics employed by Dinerstein to frustrate the accounting ordered in the State Court proceeding. There, Dinerstein has on motion of the receiver been held in contempt of court and has been ordered committed to the county jail after willfully refusing to comply with orders of the Court directing him to furnish books and records as part of the accounting. Dinerstein has engaged in a persistent course of conduct to hamper and impede the receiver, including an outrageous attempt to have him arrested by the New York City Police.
- 23. Obviously, Dinerstein intends to pursue his policy of delay and obstruction so as to continue to insulate monies obtained as a result of his breach of fiduciary obligations from recovery by Tinsley. It is apparent from the history of the action and of the State Court proceeding that any further directives to Dinerstein to forthwith comply or even the more drastic adjudication of contempt of court will be ineffective to effectuate the mandate of the interlocutory judgment. While an adjudication of contempt herein may serve to vindicate the dignity of the Court, it will be ineffective to yield a proper accounting and effectuate the purposes of the interlocutory judgment. It is only through the appointment of a receiver that the accomplishment of such purposes can be ensured.
- 24. Each of the jurisdictional requisites for appointment of a receiver are present here. Bendyne, while a Delaware corporation, maintains its principal place of

business in New York at 150 Fifth Avenue, New York, New York. The assets, books, records and the officer of the corporation are within the State of New York and Southern District of New York. The relief sought is auxiliary to the main relief sought in the action, i.e., an accounting of profits from sales of "Living Nail" and protector shield and a transfer of patent rights to the protector shield. Plaintiff's rights to both forms of relief has already been determined.

25. It is to prevent any further frustration of his rights that plaintiff urges that this auxiliary relief be granted immediately. Until such time as the transfer of patent rights in the nail protector shield is effected and plaintiff is free to market his own nail hardener utilizing the nail protector shield, defendants' duty to account and liability as constructive trustees for the sales and income derived from "Living Nail" and protector shield will continue. It is also clear that unless a receiver is appointed defendant Dinerstein will continue to breach those duties and will completely frustrate this Court's ability to restore to plaintiff some measure of the benefits to which he has been adjudged entitled. Absent the grant of the relief of the appointment of a receiver, Dinerstein will continue to dissipate the profits of Bendyne and the harm that will thereby continue to accrue to plaintiff will be irreparable.

### B. Answers to the Interrogatories

26. Plaintiff also seeks an order compelling defendants Dinerstein and Bendyne to answer interrogatories propounded and served on March 14, 1973 (Exhibit G). The time for answering these interrogatories expired on April 17, 1973 and defendants have willfully refused to answer them.

- 27. The interrogatories inquire into basic questions raised by inspection of the books of Bendyne and seek information relating to (i) transactions between Bendyne and other companies controlled by Dinerstein including the apportionment of charges for services; (ii) certain questionable expenditures and (iii) sales of "Living Nail" through other companies controlled by Dinerstein. Only through answers to these interrogatories can plaintiffs begin to unravel the maze of inter-company transactions and self-dealing.
- 28. As part of their relief sought, plaintiffs have requested that they be awarded the reasonable expenses of this portion of the motion, including attorneys' fees. As demonstrated in the annexed memorandum of law, this relief is clearly authorized by Rule 37 and we submit that defendants' willful refusal to answer such interrogatories as part of their persistent efforts to impede and delay final judgment in this Court justifies such an award.

Wherefore, for the above-stated reasons, it is respectfully requested that this Court enter an order: (a) appointing a receiver to conduct and operate the business of Bendyne until final judgment is entered herein; (b) pursuant to Rule 37(a) and (d) of the Federal Rules of Civil Procedure directing defendant within ten (10) days to answer the interrogatories propounded and awarding plaintiffs the reasonable expenses of this portion of the motion, including reasonable attorneys' fees.

Michael C. Silberberg

(Sworn to June 5, 1973.)

### Exhibit A Annexed to Affidavit of M. C. Silberberg Order Granting Preliminary Injunction and Other Relief

(Same as Exhibit A Annexed to Affidavit of Michael C. Silberberg printed herein at page 61a.)

## Exhibit B Annexed to Affidavit of M. C. Silberberg Letter Dated December 31, 1971

(Same as Exhibit C Annexed to Affidavit of Leonard W. Wagman printed herein at page 29a.)

# Exhibit C Annexed to Affidavit of M. C. Silberberg Interlocutory Judgment Entered January 4, 1972

(Same as Exhibit B Annexed to Affidavit of Michael C. Silberberg printed herein at page 67a.)

# Exhibit D Annexed to Affidavit of M. C. Silberberg Order of Commitment

At a Special Term, Part I, of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse thereof, 60 Centre Street, Borough of Manhattan, City and State of New York, on the 21st day of February, 1973

#### Present:

Hon. BIRDIE AMSTERDAM, Justice

Index No. 16055/66

CHARLES DINERSTEIN,

Plaintiff.

against

BENJAMIN DINERSTEIN,

Defendant.

Edward A. Wagner, the Receiver of C. B. Sales Co., a partnership consisting of the plaintiff and the defendant, having moved this Court by order to show cause dated November 10, 1972 for an order of commitment directing the defendant, Benjamin Dinerstein, to be committed by the Sheriff of any County of the State of New York or of the City of New York to the Common or County Jail of the County wherein he may be found and to be detained therein until he shall fully comply with the final order upon contempt proceedings dated August 3, 1971, as amended by an

Exhibit D Annexed to Affidavit of M. C. Silberberg

order of this Court dated September 6, 1972 or until he shall otherwise be discharged according to law,

Now, upon reading and filing the affidavits of Robert A. Greenbaum, Esq., attorney for Edward A. Wagner, the Receiver of C. B. Sales Co. sworn to the 6th day of November, 1972 and the 10th day of January, 1973, the orders of this Court dated August 3, 1971 and September 6, 1972 and the order to show cause dated November 10, 1972, all of which papers were read in support of the motion, and the affidavit of Benjamin Dinerstein, sworn to December 27, 1972, read in opposition to the motion, and the Court having after due deliberation filed its decision,

Now, on motion of Robert A. Greenbaum, Esq., attorney for the Receiver, Edward A. Wagner, it is

Ordered, that the motion for an order of commitment against the defendant, Benjamin Dinerstein, be and the same is hereby granted; and it is further

Ordered, Adjudged and Decreed that the defendant, Benjamin Dinerstein, having been declared guilty of contempt of Court by orders of this Court dated August 3, 1971 and as amended by an order dated September 6, 1972 for his wilfull disobedience of an order of this Court dated November 10, 1970 in that he failed to obey the direction in said latter order that he turn over to Edward A. Wagner, Receiver of C. B. Sales Co., the said company's furniture and fixtures, to wit, 2 IBM typewriters, a Pitney-Bowes postage machine and element, 2 electric adding machines, an office desk and chair, 2 "L" desks from Nathan Co., 7 filing cabinets, all inventory records, retail sales records, cash register tapes, tax returns, payroll records, cash receipt journals and bank deposit slips since January 1, 1966 and for which wilfull disobedience and misconduct the contempt order

### Exhibit D Annexed to Affidavit of M. C. Silberberg

dated August 3, 1971 fined the defendant the amount of \$100 with leave given the defendant to purge himself by complying with the order of November 10, 1970, pay the fine of \$100 to the Receiver and the sum of \$150 as costs and expenses to the Receiver's attorney and producing the records, books, etc. set forth in the order at Special Term, Part II on August 24, 1971 and to deliver the office furniture and equipment to the Receiver at hi office and said contempt order of August 3, 1971 further providing that upon the defendant's failure to purge himself of his several contempts of Court by August 24, 1971 he be fined \$50 per day until the order was fully complied with, which sum of \$50 per day was limited to the sum of \$2,500 by the order of September 6, 1972, aforesaid, and defendant's contumacious conduct having persisted and still continues without any effort on his part to purge himself of the contempt, that the said failure, refusal and neglect of the defendant, Benjamin Dinerstein, to comply with said contempt orders of August 3, 1971 and September 6, 1972 was calculated to and actually did defeat, impair, impede and prejudice the rights and remedies of the Receiver herein; and it is further

Ordered, Adjudged and Decreed that the defendant, Benjamin Dinerstein, by reason of his misconduct and disobedience and neglect and refusal to comply with said orders be and he hereby is committed and directed to be imprisoned in the Common or County Jail of any County in the State of New York or of the City of New York in which he shall be found, there to remain charged with contempt until he shall have paid to the Sheriff of the County in which he shall be found the fine of Two Thousand Five Handred (\$2,500.00) Dollars, the fine of One Hundred (\$100.00) Dollars, the One Hundred and Fifty (\$150.00) Dollars costs and expenses of the Receiver's attorney, and deliver to the Sheriff the C. B. Sales Co. furniture and fixtures, to wit, 2 IBM typewriters, a Pitney-Bowes postage

# Exhibit D Annexed to Affidavit of M. C. Silberberg

machine and element, 2 electric adding machines, an office desk and chair, 2 "L" desks from Nathan Co., 7 filing cabinets, all inventory records, retail sales records, cash register tapes, tax returns, payroll records, cash receipt journals and bank deposit slips since January 1, 1966 and the Sheriff's fees; and it is further

ORDERED, that the Sheriff of any County of the State of New York or of the City of New York to whom a certified copy of this order shall be delivered, shall forthwith on receipt thereof and without further process, take the body of Benjamin Dinerstein, the defendant herein, and commit him to the Common or County Jail of the County wherein he may be found, to be there detained in close custody until he shall pay the fine of Two Thousand Five Hundred (\$2,-500.00) Dollars, the fine of One Hundred (\$100.00) Dollars, the One Hundred and Fifty (\$150.00) Dollars costs and expenses of the Receiver's attorney, and deliver the C. B. Sales Co. furniture and fixtures, to wit, 2 IBM typewriters, a Pitney-Bowes postage machine and element, 2 electric adding machines, an office desk and chair, 2 "L" desks from Nathan Co., 7 filing cabinets, all inventory records, retail sales records, cash register tapes, tax returns, payroll records, cash receipt journals and bank deposit slips since January 1, 1966 together with Sheriff's fees, or until he shall otherwise be discharged according to law.

Enter

Birdie Amsterdam J. S. C.

FILED Feb 21, 1973 New York Co. Clerk's Office

### Exhibit E Annexed to Affidavit of M. C. Silberberg Claim of Bendyne Ltd.

# SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

[SAME TITLE]

State of New York ) County of New York ) ss.:

Benjamin Dinerstein, being duly sworn, deposes and says:

- 1. I reside at 40 East 9th Street, in the City, County and State of New York, and am the President of Bendyne Ltd., a creditor of C. B. Sales Co.
- 2. I submit this proof of claim to Edward A. Wagner, Esq., appointed as Receiver of C. B. Sales Co. by order of Mr. Justice Kupferman in the Supreme Court, New York County, on July 30, 1970.
- 3. There is now due and owing to Bendyne Ltd from C. B. Sales Co. the sum of \$62,541.47.
- 4. Bendyne Ltd. is owed rent by C. B. Sales Co. in the sum of \$15,800.00 for the period January, 1964 to July 31, 1970 for use by C. B. Sales Co. of a portion of the premises leased by Bendyne Ltd. at 80 East 11th Street, New York, New York, in the sum of \$200.00 per month for said period. In addition, C. B. Sales Co. is indebted to Bendyne Ltd. for rent for the period October, 1970 through January, 1971, at the rate of \$1,040.00 per month, or a total rent claim of \$19,960.00. In addition to unpaid rent due to Bendyne Ltd., the sum of \$124.70 is due for utilities.

### Exhibit E Annexed to Affidavit of M. C. Silberberg

- 5. There is due and owing to Bendyne Ltd. the sum of \$1,650.00 for Xerox services provided to C. B. Sales Co. by Bendyne Ltd. for the period January, 1965 to July 31, 1970, at the rate of \$25.00 per month.
- 6. There is due to Bendyne Ltd. from C. B. Sales Co. the sum of \$14,544.00 for quantities of "Living Nail" sold and delivered by Bendyne Ltd. to C. B. Sales Co. for the period September, 1963 to July 1, 1970.
- 7. There is due to Bendyne Ltd. from C. B. Sales the sum of \$1,500.00 for its portion of fire and liability insurance for the period of October 1, 1969 to October 1, 1970, paid by Bendyne Ltd. In addition, C. B. Sales Co. is indebted to Bendyne Ltd. in the sum of \$601.00 for workmen's compensation insurance and truck cargo coverage.
- 8. There is due to Bendyne Ltd. from C. B. Sales Co. the sum of \$540.00 for postage provided by Bendyne Ltd. to C. B. Sales for the period November 1, 1969 to July 31, 1970, at the rate of \$60.00 per month.
- 9. There is due to Bendyne Ltd. from C. B. Sales Co. the sum of \$190.00 for messenger service supplied to C. B. Sales Co. between November 1, 1969 and June 30, 1970, at the rate of \$6.00 per week.
- 10. There is due to Bendyne Ltd. from C. B. Sales Co. the sum of \$485.97, representing the sum paid to Excelsior Wine & Liquors by Bendyne Ltd. for Christmas gifts for the Holiday Season of 1969, which gifts were distributed and delivered to customers of C. B. Sales Co.
- 11. In addition, there is due to Bendyne Ltd. from C. B. Sales Co. the sum of \$3,200.00, representing sixteen (16) weeks' salary to Benjamin Dinerstein at the rate of \$200.00

### Exhibit E Annexed to Affidavit of M. C. Silberberg

per week, and the sum of \$7,600.00 for salary due to Frances Dinerstein for the period from November 10, 1969 to July 31, 1970, at the rate of \$200.00 per week.

- 12. Copies of the invoices with respect to \$50,375.67 of said charges are annexed hereto.
- 13. In addition to the foregoing which are represented by documentary evidence annexed, there is due to Bendyne Ltd. from C. B. Sales Co. rent for the month of February, 1971 in the sum of \$1,040.00.
- 14. There is due to Bendyne Ltd. from C. B. Sales Co. the sum of \$3,225.80, representing a judgment entered by Cosmair, Inc. against me in the Civil Court of the City of New York, County of New York, under Index No. 178831/70, for goods sold and delivered by Cosmair, Inc. to C. B. Sales Co. between October 22, 1969 and April 9, 1970. An execution was isued by Marshal Eugene Weisbrod in the sum of \$3,225.80 and served upon the Bank of Commerce, where Bendyne Ltd. maintained its bank account.
- 15. There is due to Bendyne Ltd. from C. B. Sales Co. the sum of \$632.21, representing a judgment obtained by Olin of New York, Inc. against me in the Civil Court of the City of New York, County of New York, under Index No. 116524/69, based upon rental of station wagons and automobiles for the delivery of merchandise to customers of C. B. Sales Co.
- 16. There is due to Bendyne Ltd. from C. B. Sales Co. the sum of \$1,323.50, representing a judgment docketed against me in the Civil Court of the City of New York, County of New York, in favor of Royal Metal Corporation under Index No. 156027/69 for goods sold and delivered by said plaintiff to C. B. Sales Co. based upon a note dated Au-

Exhibit E Annexed to Affidavit of M. C. Silberberg

gust 12, 1968 issued to plaintiff for merchandise sold and delivered to C. B. Sales Co. up to August 12, 1968.

- 17. There is due to Bendyne Ltd. from C. B. Sales Co. the sum of \$3,000.00, representing the unpaid balance of a loan made by the Bank of Commerce to C. B. Sales Co. which was deposited in the account of C. B. Sales Co. and which the Receiver failed and refused to pay despite due demand therefor. The said Bank of Commerce levied upon the bank account of Bendyne Ltd. maintained in said bank in order to effect repayment of the loan to C. B. Sales Co. There is due to Bendyne Ltd. from C. B. Sales Co. the sum of \$3,000.00, representing the reasonable value of a Dodge truck which the Receiver took possession of, although C. B. Sales Co. had not paid for same.
- 18. Bendyne Ltd. has a claim for an uncertain amount for future charges which may be asserted against it and/or me for merchandise sold and delivered to C. B. Sales Co. for which the Receiver has failed and refused to make payments to legitimate creditors of C. B. Sales Co. A certain portion of said merchandise has been sold by the Receiver either during the period in which he was operating the business of C. B. Sales Co. or at auction, but the Receiver has nonetheless refused to pay such creditors even though he has received the accounts receivables. If I or Bendyne Ltd. are compelled hereafter by legal process to satisfy the claims of such creditors, I reserve the right to amend this claim to include any such payments.
- 19. No part of the foregoing have been paid or satisfied and there are no offsets or counterclaims thereto to the knowledge or belief of your deponent.
  - 20. The said claim of Bendyne Ltd. is unsecured.

Benjamin Dinerstein

(Sworn to February 9, 1972.)

# Exhibit F Annexed to Affidavit of M. C. Silberberg Account of Defendant

# SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF NEW YORK

[SAME TITLE]

Pursuant to an interlocutory judgment of this Court entered on the 7th day of November, 1969 in the above entitled action, the defendant respectfully submits the following account:—

1. Schedule A, annexed hereto, consists of a summary of all monies, securities or other things of value received by Benjamin Dinerstein from C. B. Sales Co.

No monies, securities or other things of value were received by the wife of Benjamin Dinerstein or his agents from C. B. Sales Co. Monies paid by C. B. Sales Co. to Benjamin Dinerstein's attorneys is reflected in Schedule B hereof.

2. Schedule B, annexed hereto, sets forth a summary of all monies, securities or other things of value paid by C. B. Sales Co. for the benefit of Benjamin Dinerstein. Schedule B-1 annexed hereto sets forth a summary of loans made by Benjamin Dinerstein to C. B. Sales Co.

No monies, securities or other things of value were paid by C. B. Sales Co. except as indicated in Schedules A and B for the benefit of Benjamin Dinerstein, Benjamin Dinerstein's wife, agents or attorneys.

3. Schedule C, annexed hereto, sets forth a summary of all transactions between C. B. Sales Co. and Bendyne Ltd.

- 4. Schedule D, annexed hereto, sets forth a summary of all transactions between C. B. Sales Co. and Bendyne Products, Inc.
- 5. Schedule E, annexed hereto, sets forth a summary of all transactions between C. B. Sales Co. and Mavala, Inc.
- 6. Schedule F, annexed hereto, is a summary of all records of cash sales made by C. B. Sales Co. for the period requested to the extent that such records are in existence.
- 7. There were no transfers of assets of C. B. Sales Co. except in the ordinary course of business.
- 8. Schedule G, annexed hereto, sets forth a summary of all monies, securities or other things of value received by Benjamin Dinerstein, his wife, agents and attorneys from Mavala, Inc.
- 9. Mavala, Inc. never made payments to Benjamin Dinerstein or for the benefit of Benjamin Dinerstein's wife, his agents or attorneys.
- 10. There were no transactions between Mavala, Inc. and Bendyne Ltd., nor were there any transactions between Mavala, Inc. and Bendyne Products, Inc.
- 11. There were no transfers of assets of Mavala, Inc. except in the ordinary course of business.
- 12. Schedule H, annexed hereto, is a summary of all monies, securities and other things of value received by Benjamin Dinerstein, his wife, agents and attorneys from Bendyne Ltd.

- 13. No monies were paid by Bendyne Ltd. for the benefit of Benjamin Dinerstein, Benjamin Dinerstein's wife, his agents or attorneys.
- 14. Schedule I, annexed hereto is a summary of loans made by Benjamin Dinerstein to Bendyne Products, Inc. No monies, securities or other things of value were received from Bendyne Products, Inc. by Benjamin Dinerstein, his wife, agents or attorneys.
- 15. There were no transfers of assets of Bendyne Ltd. except in the ordinary course of business.
- 16. No monies, securities or other things of value were received by Benjamin Dinerstein from Bendyne Products, Inc. No monies were paid by Bendyne Products, Inc. for the benefit of Benjamin Dinerstein.

No monies, securities or other things of value were received by Benjamin Dinerstein's wife, agents and attorneys from Bendyne Products, Inc.

17. There were no transfers of assets of Bendyne Products, Inc. other than in the ordinary course of business, except for the transfer of physical inventory to Benjamin Dinerstein on March 31, 1967 in partial reduction of loans payable to Benjamin Dinerstein. Said inventory had a book value of \$8,510.30 and left a balance due to Benjamin Dinerstein from Bendyne Products, Inc. in the sum of \$3,114.70.

Dated: February 10, 1970.

Benjamin Dinerstein

(Verified by Benjamin Dinerstein on February 10, 1970.)

#### SCHEDULE C

In the last four months of 1963 and in the first ten months of 1964, certain employees of C. B. Sales Co. rendered services largely consisting of manual labor involving the packing and shipping of merchandise for the benefit of Bendyne Ltd. Accordingly, as of October 1, 1964 it was determined, in consultation with the accountants for Bendyne Ltd., that Bendyne Ltd. had received services from C. B. Sales Co. which had the reasonable value of \$13,815.

Between September 2, 1964 and March 6, 1969, payments were made from Bendyne Ltd. to C. B. Sales Co. in the amounts and on the dates indicated:

September 2, 1964	\$ 1,500.00
September 22, 1964	1,000.00
October 28, 1964	1,000.00
November 30, 1964	750.00
October 9, 1965	2,000.00
August 18, 1967	1,000.00
December 27, 1968	500.00
January 3, 1969	1,440.00
January 24, 1969	1,000.00
March 4, 1969	900.00
March 6, 1969	1,000.00

Total \$12,090.00

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Between September, 1963 and June 30, 1969 the following quantities of Living Nail were delivered to C. B. Sales Co. by Bendyne Ltd. for resale:

Quantity	Period	$Price \ Per Gross$	Amount For Period
5 Gross	Sept. 1963- Dec. 1963	\$288.00	\$ 1,440.00
7 Gross	Calendar year 1964	288.00	2,016.00
$6\frac{1}{2}$ Gross	Calendar year 1965	288.00	1,872.00
$5\frac{1}{2}$ Gross	Calendar year 1966	288.00	1,584.00
8 Gross	Calendar year 1967	288.00	2,304.00
$7\frac{1}{2}$ Gross	Calendar year 1968	288.00	2,160.00
4 Gross	January, 1969- June 30, 1969	288.00	1,152.00

Total Purchases \$12,528.00 of Living Nail

Between January, 1965 and June 30, 1969, C. B. Sales Co. made constant and regular use of a Xerox machine leased by Bendyne Ltd. Bendyne Ltd. has accrued this obligation for the 4½-year period at the rate of \$25.00 per month, resulting in a payment due to Bendyne Ltd. from C. B. Sales Co. in the sum of \$1,350.00.

Between January, 1964 and June 30, 1969, a substantial portion of the premises leased by Bendyne Ltd. from Cambridge Management Company was used for the sole purpose

C. B. Sales Co. The portion of the Bendyne Ltd. premises occupied exclusively by merchandise stored for the benefit of C. B. Sales Co. had the reasonable rental value of \$200 per month. Bendyne Ltd. has accrued the rental obligation for the 4½-year period between January, 1964 and June 30, 1969 at the rate of \$200 per month, or a total accrued indebtedness due to Bendyne Ltd. from C. B. Sales Co. in the sem of \$13,200.

Based upon the foregoing, there is a net sum now due from C. B. Sales Co. to Bendyne Ltd. in the sum of \$25,353.

In addition to the foregoing summary, certain of the employees of C. B. Sales Co. performed manual services from time to time, consisting of segregating and packing merchandise for shipment and making physical deliveries of shipments to the post office. Throughout this same period, from time to time, a clerical employee of Bendyne Ltd. performed a substantial amount of clerical services for the benefit of C. B. Sales Co. In view of the difficulty in allocating the various services with any degree of precision, no attempt has been made to strike a balance in favor of Bendyne Ltd. for the value of the services performed as described above.

#### SCHEDULE D

There were no transactions in the periods indicated between C. B. Sales Co. and Bendyne Products, Inc.

#### SCHEDULE E

Between in or about April, 1962 and March, 1963, certain services consisting primarily of sales promotional work, selling and general administrative functions were performed by me for the benefit of Mavala, Inc. During the said period certain services consisting of manual labor involving packaging and shipping of merchandise were performed by employees of C. B. Sales Co. for the benefit of Mavala, Inc. Although I estimated that the value of the services performed by C. B. Sales Co. for Mavala, Inc. exceeded \$25,000, during that period, I was unable to reach any agreement with Mavala, Inc. concerning the amount of compensation, if any, due from Mavala, Inc. to C. B. Sales Co.

The following payments were made by Mavala, Inc. to C. B. Sales Co. between February 15, 1963 and April 15, 1963:

Date	Amount
February 15, 1963	\$1,200.00
February 26, 1963	1,200.00
March 11, 1963	600.00
March 18, 1963	600.00
March 25, 1963	2,400.00
April 1, 1963	1,200.00
April 8, 1963	1,200.00
April 15, 1963	1,200.00

In addition, the following payments were made for the benefit of Mavala, Inc. by C. B. Sales Co. on the dates and in the amounts indicated:

March 14, 1966	New York State Corporation Tax Bureau	\$ 25.00
March 10, 1967	,,	25.00
June 3, 1968	,,	43.75
June 12, 1969	,,	100.00

The following loans were made by Benjamin Dinerstein to Bendyne Products, Inc. on the dates and in the amounts indicated:—

Date	Amount	
1965		
June 28th	\$ 600.00	
July 6th	2,000.00	
November 22nd	2,000.00	
December 3rd	2,000.00	
1966		
February 4th	650.00	
April 7th	1,000.00	1
July 22nd	1,500.00	
September 29th	625.00	
December 19th	500.00	
December 26th	750.00	
Total	\$11,625.	00

#### Affidavit of Benjamin Dinerstein in Opposition to Foregoing Motion

#### UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

State of New York ) County of New York ) ss.:

Benjamin Dinerstein, being duly sworn, deposes and says:

- 1. I am an individual defendant in this action and the President of Bendyne Ltd., one of the corporate defendants.
- 2. I respectfully submit this affidavit to the Court in opposition to plaintiffs' application requesting that a Receiver for Bendyne Ltd. be appointed pending the entry of final judgment herein.
- 3. The attorneys for the plaintiffs urge that such appointment is required to prevent the frustration of the interlocutory judgment herein which directs, among other things, that the defendants produce for inspection and copy by plaintiffs "\* \* all records and accounts for sale of the product 'Living Nail' and the shield protector, and all income derived from such sales \* \* \* "'
- 4. From the time of the incorporation of Bendyne Ltd., the books and records of said defendants were at all times maintained by Ash & Parsont, independent certified public accounts. All entries set forth in said books and records

#### Affidavit of Benjamin Dinerstein

were made by partners or employees of that accountant firm. I am advised by my accountants that the books and records have been maintained on a conventional double entry bookkeeping system. The records that have been produced for extended examination by the plaintiffs' attorneys and independent accountants retained by the plaintiffs, include the following:

- (a) General ledgers and general journals for eight fiscal years ending May 31, 1971;
- (b) Copies of all sales invoices from September, 1963 to May 31, 1972;
- (c) Purchase journal from November, 1963 through August, 1972;
- (d) Cash receipt journal for the period July 1963 through September, 1972;
- (e) Cash disbursement books for the period ending September, 1972, and
- (f) Accounts payable ledgers and accounts receivable ledgers from the inception of the business through May 31, 1972.
- 5. Subsequent to the entry of the interlocutory judgment in this action in January, 1972, the income tax returns of Bendyne Ltd. were supplied to the attorneys for the plaintiffs in February of 1972. To the best of my knowledge, information and belief, all of the entries in the books and records prepared and maintained by Ash & Parsont, and the information set forth in the United States Corporate Income Tax returns prepared by Ash & Parsont are truthful, accurate, correct and complete.
- 6. Subsequent to the delivery of income tax returns to plaintiffs' counsel and in the latter part of February, 1972,

#### Affidavit of Benjamin Dinerstein

all of the general journals through the fiscal year 1971 were made available to plaintiffs' counsel.

- 7. Subsequently request was made for an opportunity to examine the books of original entry and I requested that my counsel object to an examination of those records since "Living Nail" and "Scientifique" were being sold in direct competition (as they had been for many years), and I felt that it was improper to have the identity of Bendyne's customers and suppliers revealed to the plaintiffs. Thereafter a great deal of time and effort was devoted to the masking of confidential information set forth in Bendyne's records. The "masked" records were reviewed in detail by plaintiffs' attorneys and accountants.
- 8. Upon the completion of the review of the masked documents in June of 1972, plaintiffs' counsel indicated that they felt that the masking had deprived them of an opportunity to examine the records in detail and accordingly an application was made to Your Honor in early September, 1972 to direct that the Bendyne records be made available to the attorneys and accounts for the plaintiffs on condition that the contents of the records and the identity of customers and the source of supply not be disclosed without a court order. At that conference before Your Honor in September of 1972, you directed that the records be made available on the condition set forth above. This direction by the Court was fully complied with and in October of 1972 plaintiffs' counsel advised that the examination of the books would commence on November 6, 1972 at my attorneys' office. The books and records were made available for the examination which commenced on November 6, 1972.
- 8. From time to time requests for additional information were made by Mr. Albert Dworkin with respect to cer-

#### Affidavit of Benjamin Dinerstein

tain worksheets maintained by Ash & Parsont, and a request for a further review of Bendyne's corporate tax return. All requests by Mr. Dworkin and his associates were fully complied with, and I am advised that the examination by plaintiffs' accountants terminated sometime in February of 1973.

- 9. Mr. Silberberg's accusation that all sales of "Living Nail" are not set forth in the Bendyne records and have purportedly been diverted to other corporations is completely inaccurate. As will be evident when the answers to the interrogatories which are being prepared by my accountants and my attorneys have been submitted to the Court, Mr. Silberberg's undocumented and unfounded accusations and insinuations will be clearly and accurately explained.
- 10. With respect to Mr. Silberberg's attempts to compare certain procedures in the State Court liquidation of C. B. Sales Co., I have been held in contempt based upon an order directing me to produce documents which either never existed or were left in the custody and control of the Receiver, and hence I was physically unable to produce documents that either do not exist or were in the possession of the person seeking the order.
- 11. With respect to certain items of personal property, I possess documentary proof of the fact that several of these items were personal gifts or were awards which I had won in connection with sales contests. I am advised that any attempt by plaintiffs' counsel to draw comparisons between a State Court partnership liquidation and my efforts to produce books and records and other information for the plaintiffs in this action is improper and unwarranted. I emphatically deny that any dissipation of the

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## Affidavit of Benjamin Dinerstein

the assets of Bendyne Ltd. has taken place or will take place in the future. On the contrary, every effort is being used to enforce all of the rights of Bendyne Ltd.

Wherefore, I respectfully request that plaintiffs' motion insofar as it seeks the appointment of a Receiver be denied in all respects.

Benjamin Dinerstein

(Sworn to July 6, 1973.)

## Order Compelling Defendants to Answer Interrogatories

#### UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

This cause having come on to be heard on plaintiffs' motion for an order pursuant to Rule 66 of the Federal Rules of Civil Procedure, directing the appointment of a receiver for defendant Bendyne, Ltd., in aid of effectuation of plaintiffs' interlocutory judgment, and pending entry of final judgment in this action, and pursuant to Rule 37(a) and (d) of the Federal Rules of Civil Procedure, compelling defendants to answer the written interrogatories propounded by plaintiffs on March 14, 1973, together with the reasonable expenses, including attorneys fees, incurred with respect to the latter portion of the motion; and the plaintiffs having submitted the affidavit of Michael C. Silberberg, Esq., verified the 5th day of June, 1973 and the exhibits attached thereto in support of said motion; and the defendants having submitted the affidavit of C. Benjamin Dinerstein, verified the 6th day of July, 1973, in opposition to said motion; and the Court on July 31, 1973 having heard Leonard W. Wagman of Golenbock and Barell, attorneys for the plaintiffs in support of said motion and Michael Stanton of Weil, Gotshal and Manges in opposition to the motion, and it appearing that the immediate service by defendants of full and complete answers to plaintiffs' interrogatories would serve to assist the Court in making its decision on the branch of plaintiffs' motion which seeks the appointment of a receiver, and no objection having been raised by defendants with respect to that portion of plainOrder Compelling Defendants to Answer Interrogatories

tiffs' motion which seeks an order compelling defendants to answer the interrogatories, it is

Ordered, that defendants C. Benjamin Dinerstein and Bendyne, Ltd. shall, on or before August 13, 1973, serve and file their answers to the interrogatories which were propounded by plaintiffs on March 14, 1973 and it is further

Ordered, that the foregoing relief is granted and directed without prejudice to the remaining portions of plaintiffs' motion which seek an order directing the appointment of a receiver for Bendyne, Ltd. and the award of plaintiffs' reasonable expenses, including attorneys fees, and the Court's decision upon those remaining portions of plaintiffs' motion is hereby reserved until such time as plaintiffs present to the Court, at any time after either August 13, 1973 or the date of service of defendants' answers to the interrogatories, whichever shall first occur, a report with respect to defendants' answers to the interrogatories, and the effect, if any, upon that portion of the motion which seeks the appointment of a receiver.

Dated: New York, New York August , 1973

> R.J.W. U.S.D.J.

## Defendants' Answers and Objections to Plaintiffs' Interrogatories

#### UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Defendants, Bendyne, Ltd. ("Bendyne") and C. Benjamin Dinerstein ("Dinerstein"), in response to the Interrogatories served by plaintiffs herein, answer or object as follows:

#### Interrogatory:

- 1. (a) Set forth the state of incorporation of defendant Bendyne and specify each foreign country under whose laws it is authorized to transact business.
- (b) List each officer of defendant Bendyne since January 1964.

## Response:

- 1. (a) Delaware. None.
- (b) Benjamin Dinerstein.

#### Interrogatory:

2. Set forth the name of each corporation and/or company other than defendant Bendyne organized under the laws of any state of the United States or any foreign country which since January 1964 has utilized "Bendyne" in its corporate or company name and in which defendant Dinerstein and/or Bendyne own any interests.

## Response:

2. Bendyne Products, Inc.

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#### Defendants' Answers and Objections

#### Interrogatory:

3. With respect to each corporation or entity identified in 2 above, set forth the (a) date of its incorporation or formation; (b) the place of its incorporation or organization; (c) the name of each of its officers; (d) a description of its business and (e) the percentage of outstanding stock owned by (i) defendant Bendyne and/or (ii) defendant Dinerstein.

#### Response:

- 3. (a) April 13, 1965.
- (b) New York State.
- (c) Benjamin Dinerstein.
- (d) The sale and distribution of an aerosol cooling deodorizing foot spray.
- (e) Defendant Dinerstein is the owner of 100% of the outstanding stock. (Said corporation has been dormant since on or about November 1966.)

#### Interrogatory:

4. Set forth the name of each corporation and/or company other than those identified in answer to 2 above organized under the laws of any state of the United States or any foreign country in which defendants Dinerstein or Bendyne own at least 10% of the outstanding common stock including but not limited to Bendol, Inc., C-B Sales Co. and Benesco, Inc.

## Response:

4. Bendol, Inc. and C-B Sales Co.

#### Interrogatory:

5. With respect to each corporation or company identified in 4 above, set forth (a) date of its incorporation or formation; (b) the place of its incorporation or organization; (c) the names of each of its officers; (d) a description of its business; and (e) the percentage of outstanding stock owned by (i) defendant Bendyne and/or (ii) defendant Dinerstein.

Response: Re: Bendol, Inc.

- 5. (a) September 24, 1971.
- (b) New York.
- (c) Benjamin Dinerstein, Frances Dinerstein and Walter Weissenberger.
- (d) The importation, sale and distribution of the Hattric line of cosmetics for men.
- (e) Defendant Dinerstein owns 60% of the outstanding stock of Bendol, Inc.

Re: C-B Sales Co.

- (a) Defendant Dinerstein filed a Certificate of Conducting Business under the name of C-B Sales Co. in July 1948.
  - (b) New York State.
- (c) and (e) A dispute between Benjamin Dinerstein and his brother Charles culminated in the business being liquidated since 1969.
- (d) Sale and distribution of cosmetics and beauty supplies to beauty parlors.

#### Interrogatory:

6. Identify each office maintained by defendant Bendyne for the transaction of business since January 1, 1964, specifying with respect to each whether owned or rented, and if rented, for each lease since January 1, 1964 set forth (a) the identity of the lessor; (b) the identity of the lessee; (c) the duration of the lease; (d) the yearly rent; and (e) the square footage and number of rooms rented.

#### Response:

6. All premises maintained by defendant Bendyne were rented. Bendyne's first office was at 80 East 11th Street, New York, New York, and its second office was located at 150 Fifth Avenue, New York, New York. At 80 East 11th Street, Cambridge Management Corp. was the lessor and Bendyne, Ltd. was lessee. The lease was for a period of five years with an annual rental of \$3,300 plus gas and electricity. Bendyne, Ltd. rented approximately 500 square feet of space plus basement space of approximately 300 square feet. At 150 Fifth Avenue Bendyne, Ltd. rented an office consisting of approximately 1,000 square feet together with basement space consisting of approximately 300 square feet. The landlord is 150 Estates. Bendyne, Ltd. is the lessee for a five year lease commencing March 15, 1971 at an annual rental of \$5,220.

Bendol, Inc. maintains an office at 150 Fifth Avenue, New York, New York. 150 Estates is the landlord. Bendol, Inc. is the tenant under a five year lease with an annual rental of \$2,580, consisting of approximately 500 square feet in one room.

#### Interrogatory:

7. List each corporation and/or company identified in answer to 2 and/or 4 above which has since January 1, 1964 transacted any business at any address in answer to 6 above.

#### Response:

7. Bendyne Products, Inc. and C-B Sales Co. have transacted business at 80 East 11th Street. Bendol, Inc. has transacted business at 150 Fifth Avenue.

- 8. (a) With respect to each corporation or company identified in answer to 7 above, state whether it has at any time since January 1964 shared offices with defendant Bendyne or whether it has occupied separately designated office space at the address.
- (b) If separately designated space was occupied set forth for each such corporation and/or company:
  - (i) the square footage and number of rooms occupied;
  - (ii) whether the space was rented pursuant to the provisions of a lease other than that identified in answer to 6 above and if so set forth:
    - A. the identity of the lessor;
    - B. the identity of the lessee;
    - C. the duration of the lease;
    - D. the amount of yearly rent;
    - E. The square footage and number of rooms rented.
- (c) If office space was shared, set forth the method by which rent was apportioned between defendant Bendyne and any other corporation or company including (i) the amount paid by each company; and (ii) the basis for apportionment thereof.

#### Response:

- 8. (a) Bendyne used a portion of C-B Sales Co. premises at 80 East 11th Street commencing in September of 1963 through 1964. Bendyne Products, Inc. shared a desk at the Bendyne, Ltd. premises between the summer of 1965 and approximately November 1966 when Bendyne Products, Inc. became dormant. Bendol, Inc. occupies separately designated office space at 150 Fifth Avenue.
  - (b) (i) and (ii) inapplicable.
  - (c) No rent was apportioned for office space.

#### Interrogatory:

- 10. (a) Identify each person employed by defendant Bendyne since January 1964 and with respect to each set forth (i) the dates of their employment; (ii) a description of the work performed by them; and (iii) the monthly salary paid to them.
- (b) Did any person identified in response to 10(a) above perform services during the period January 1964 to present for any corporation or company identified in answer to 2 and/or 3 above.
- (c) If the answer to 10(b) is anying but an unqualified negative, set forth with respect to each such person, the method by which their salary was apportioned between defendant Bendyne and any other corporation or company including the (i) amount paid by each; and (ii) basis for apportionment thereof.

## Response:

- 10. (a) See Schedule A annexed hereto as Exhibit 1.
- (b) No.
- (c) Not applicable.

#### Interrogatory:

- 11. (a) Identify each insurance policy paid for by defendant Bendyne since January 1, 1964 including (i, type of policy; (ii) the identity of the insured(s); (iii) the annual premium for each year since 1964; (iv) the name of the insurance carrier; and (v) the name of the broker through whom the policy was placed.
- (b) Did any policy described in answer to 11(a) provide insurance for persons employed by or for property utilized by any corporation or company identified in answer to 2 and/or 4 above.
- (c) If the answer to 11(a) is anything but an unqualified negative (i) identify each such policy; and (ii) set forth the method by which the premiums were apportioned between the companies including:
  - A. the amount paid by each; and
  - B. the basis for apportionment thereof.

## Response:

- 11. (a) (i) Workmen's Compensation.
- (ii) Bendyne, Ltd. and C-B Sales Co. premium for policy year October 5, 1969 through October 4, 1970—\$391.00. Policy year October 5, 1970 through October 4, 1971, Bendyne, Ltd. and Bendyne Products, Inc.—\$50.00. Policy year October 5, 1971 through October 4, 1972, Bendyne, Ltd. and Bendyne Products, Inc., annual premium \$52.00. Policy year October 5, 1972 to present, Bendyne, Ltd., Bendol, Inc., premium not ascertained.
- (iv) Insurance policy was by Continental National American Insurance Company.
  - (v) Broker was Gotsch, Steinmitz and Winston, Inc.

In addition, the same broker procured a general liability and property policy through the same insured covering the period January 16, 1969 through January 15, 1972 designating Bendyne, Ltd., C-B Sales Co. and Bendyne Products, Inc. as assureds with an annual premium of \$4,578.00. Said policy was renewed on January 16, 1972 designating Bendyne, Ltd., Bendyne Products, Inc., and Bendol, Inc. as assureds with an annual premium of \$6,628.00. Defendants are still attempting to procure information for the period 1964 through 1969 as well as the amount of any apportionment of the payment of the premiums and the basis for apportionment, which will be submitted to the Court by supplemental answer to this question 11.

- 12. (a) State whether charges for (i) telephone; (ii) cleaning services; (iii) electricity; and (iv) trucking and shipping, were at any time since January 1964 apportioned between defendant Bendyne and any corporation or company identified in answer to 2 and/or 4 above.
- (b) As to each answer to 12(i)-(iv) above which is anything but an unqualified negative, set forth for each year since January 1964:
  - (i) the identity of each company or corporation between whom such charges were apportioned;
    - (ii) the total amount of charges for the service;
  - (iii) the amount charged to defendant Bendyne and any corporation or company identified in 2 or 4 above; and
    - (iv) the basis for apportionment thereof.

#### Response:

12. Between September 1963 and May 1964 personnel employed by C-B Sales Co. and equipment owned by C-B Sales Co. performed services for Bendyne, Ltd. in the following categories and with the following reasonable costs:

(a)	Bookkeeping	\$ 3,400.00
(b)	Protection	230.00
(c)	Electricity	115.00
(d)	Cleaning	128.00
(e)	Receiving and Shipping	9,961.50
(f)	Trucking	3,480.00
	Balance due to C-B Sales Co.	\$17,315.00
	Paid on account on May 31, 1964	3,500.00
	Balance due	\$13,815.00

The basis for such apportionment was conferences with the Certified Public Accountant employed by Bendyne, Ltd. to achieve an equitable apportionment of the value of the services performed and the equipment involved.

#### Interrogatory:

13. (a) Set forth all companies, persons or entities to whom the following sums were paid for "advertising costs" as reflected in defendant Bendyne's books:

(i)	1964—\$49,826.00
(ii)	1965—\$58,035.00
(iii)	1966—\$11.386.00
(iv)	1967—\$10,191.00
(v)	1968—\$19,683.00
(vi)	1969-\$11,462.00
(vii)	1970-\$ 5,020.00
(viii)	1971-\$ 4,569.00
(ix)	1972-\$14,507.00

- (b) Did any company, person or entity identify in response to 13(a) provide services since January 1964 to any corporation or company identified in answer to 2 and/or 4 above.
- (c) If the answer to 13(b) is anything but an unqualified negative, set forth for each year whether the charges for "advertising" were apportioned between defendant Bendyne and any company identified in answer to 2 and/or 4 above and if so, set forth
  - (i) the amount paid by each company; and
  - (ii) the basis for apportionment thereof.

#### Response:

- 13. (a) Annexed hereto as Exhibit 2 is a summary, broken down by fiscal year, setting forth all entities paid for advertising costs as reflected in the records of Bendyne Ltd. designating payees and the amounts paid in each fiscal year.
  - (b) Yes.
- (c) No apportionment took place. Any entity for which advertising services were rendered paid any charge directly to the person rendering the service.

- 14. (a) Did defendant Bendyne maintain an account with American Express and if so list all account numbers.
- (b) If defendant Bendyne did not maintain an American Express account in its own name identify the account numbers pursuant to which payments of \$10,568.27 to American Express were made during the period January

1964 to May 1972 as reflected on defendant Bendyne's books including, but not limited to:

- (i) the number of the account; and
- (ii) the name of the person or company in whose name the account was maintained.

#### Response:

- 14. (a) No.
- (b) 001-276-489-0-Benjamin Dinerstein.

#### Interrogatory:

- 15. (a) Since January 1964 has the product "Living Nail" been sold by any company other than defendant Bendyne?
- (b) If the answer to 15(a) is anything but an unqualified negative, set forth for each company which sold "Living Nail":
  - (i) its name and address;
  - (ii) the date such sales commenced; and
  - (iii) the dollar amount of its sales of "Living Nail" for each year since 1964.

## Response:

- 15. (a) No.
- (b) Not applicable.

#### Interrogatory :

16. (a) Since January 1964, has defendant Bendyne manufactured and/or sold any product other than "Living Nail".

- (b) If the answer to 16(a) is anything but an unqualified negative, set forth for each such product:
  - (i) its trade name;
  - (ii) the dates its sale commenced;
  - (iii) a description of the product; and
  - (iv) the dollar amount of its sales for each year since 1964.

#### Response:

- 16. (a) Yes.
- (b) "Living Steps"—in or about 1968—a soothing, cooling aerosol foot spray. Invoices of Bendyne Ltd. for the period 1968-1971 reflect sales of "Living Steps" in the sum of \$8,522.14.

- 17. (a) Has any corporation or company identified in answer to 2 and/or 4 above manufactured and/or sold or licensed others to manufacture and/or sell a nail hardening product since January 1964 under a name other than "Living Nail".
- (b) If the answer to 17(a) is anything but an unqualified negative set forth with respect to each such company
  - (i) the trade name of each such product;
  - (ii) the dates of its sales;
  - (iii) a description of the product;
  - (iv) the dollar amount of the sales for each year since 1964; and
  - (v) whether any such product utilized a nail protector shield which is claimed under U.S. Patents 3,245,418 and 3,382,878.

#### Response:

- 17. (a) No.
- (b) Not applicable.

#### Interrogatory:

- 18. (a) Have defendants Bendyne or Dinerstein licensed others to manufacture and produce nail protector shields under U.S. Patent Nos. 3,245,418 and 3,382,878.
- (b) If the answer to 18(a) is anything but an unqualified negative, set forth
  - (i) the identity of the licensee;
  - (ii) the identity of the licensor;
  - (iii) the date of the license;
  - (iv) whether the license was oral or in writing; and
  - (v) the amount paid in license fees for each year since January 1964.

## , Response:

- 18. (a) No.
- (b) Not applicable.

- 19. (a) Has defendant Bendyne at all times since January 1964 manufactured and/or synthesized the "Living Nail" liquid nail hardener sold by it or any company identified in response to 15 above.
- (b) If the answer to 19(a) is anything but an unqualified negative set forth:
  - (i) the amount of formaldehyde purchased by defendant Bendyne since January 1964;

- (ii) the name and address of the company from whom such formaldehyde was purchased; and
  - (iii) the amount paid therefor.
- (c) If the liquid nail hardener was manufactured or synthesized by a company or corporation other than defendant Bendyne set forth for each such company
  - (i) the name and address of each such corporation;
  - (ii) the quantity of liquid nail hardener purchased by defendant for each year since January 1964; and
  - (iii) the amount paid by Bendyne for purchase of the liquid nail hardener for each year since January 1964.

#### Response:

- 19. (a) No.
- (b) Not applicable.
- (c) (i) Foster D. Snell, Inc., 29 West 15th Street, New York, New York (1964-1968).
  - (ii) 1964—50 gallons 1965—50 gallons 1967—50 gallons
  - (iii) 1964—\$188.85 1965— 180.65 1967— 200.00 1968— 200.00
    - (i) W. B. Chemical Co., 15 Macquesten Parkway, South, Mount Vernon, New York (1970-1971).
    - (ii) 1970—50 gallons 1971—50 gallons
  - (iii) 1970—\$161.57 1971— 162.84

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## Defendants' Answers and Objections

- 20. (a) Did defendant Bendyne at all times since January 1964 bottle the "Living Nail" sold by it or any company identified in response to 15 above.
- (b) If the answer to 20(a) is anything but an unqualified negative, set forth
  - (i) the number of bottles purchased by defendant Bendyne since January 1964;
  - (ii) the name and address of the company from whom purchased; and
    - (iii) the amount paid therefor.
- (c) If "Living Nail" was bottled by a company other than defendant Bendyne, set forth for each such company
  - (i) the name and address;
  - (ii) the total number of units bottled in each year since January 1, 1964; and
  - (iii) the amount paid by defendant Bendyne for bottling in each year since January 1964.
- 21. (a) Did defendant Bendyne at all times since January 1964 package the "Living Nail" sold by it or any company identified in response to 15 above.
- (b) If the answer to 21(a) is anything but an unqualified negative, set forth
  - (i) the number of units packaging purchased by defendant Bendyne since January 1964;
  - (ii) the name and address of the company from whom purchased; and
    - (iii) the amount paid therefor.

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#### Defendants' Answers and Objections

- (c) If "Living Nail" was packaged by a company other than defendant Bendyne, set forth for each such company
  - (i) the name and address;
  - (ii) the total number of units packaged in each year since January 1, 1964; and
  - (iii) the amount paid by defendant Bendyne for packaging in each year since 1964.

#### Response:

- 20.(a) and 21.(a) No.
- 20.(b) and 21.(b) Not applicable.
  - (b) Not applicable.
- (c) The name and address of the organization which bottled and packaged "Living Nail" and the number of bottles per annum and charges therefor are set forth on Exhibit 3 annexed hereto.

- 22. (a) Did defendant Bendyne at all times since January 1964 manufacture the nail protector shields sold with "Living Nail".
- (b) If the nail protector shields sold with "Living Nail" at any time since January 1964 were manufactured by a company other than defendant Bendyne set forth
  - (i) the name and address of the company;
  - (ii) the total number of shields purchased in each year since 1964; and
  - (iii) the amount paid by defendant Bendyne for shields in each year since January 1964.

#### Response:

- 22. (a) No.
- (b) (i) Foilcraft Printing Corp., 45 Cherry Valley Road, West Hempstead, New York
  - (ii) 100,000 shields—1964
  - (iii) \$1,360.00-1964.
  - (i) Beau Label Corp., 124 White Street, New York, New York
    - (ii) 1970—100,000 shields
    - (iii) 1970-\$1,510.00.

- 23. Set forth in complete and precise detail the basis of the following payments and/or transactions to the parties indicated which are reflected in the defendant Bendyne's books including (a) the nature of the obligation; (b) the date the obligation was incurred; (c) a description of each and every document which relates in any way to the obligation.
  - (i) a payment of \$3,500. to C-B Sales—May 31, 1964;
  - (ii) a payment of \$13,815. to C-B Sales—May 31, 1964;
  - (iii) a payment of \$16,000. to Ben Sackheim, Inc. May 31, 1963;
  - (iv) a transfer of \$15,000. in capital stock to Macquire & Co.—May 31, 1964;
  - (v) a payment of \$10,586. to C-B Sales—May 31, 1964;

- (vi) a payment of \$3,500. to C-B Sales—May 31, 1964;
- (vii) payments totalling \$1,007. to defendant Dinerstein in 1968;
- (viii) payments totalling \$955. to defendant Dinerstein in 1969;
- (ix) payments totalling \$2,000. "re Benesco"—January 30, 1968;
- (x) payments totalling \$860. to defendant Dinerstein in 1970;
- (xi) payments totalling \$5,177. to defendant Dinerstein in 1971;
- (xii) a payment of \$2,000.—"Krin & Balon (Benesco)"—dated April 29, 1968.

#### Response:

- 23. (i) See response to Interrogatory 12 above.
- (ii) This item does not represent a payment but an account payable. See Response 12 above.
- (iii) This item does not represent a payment but a credit due to Bendyne Ltd. from Ben Sackheim, Inc. for advertising services to be performed having a value of \$16,000.00.
- (iv) J. P. Maguire & Co. paid Bendyne Ltd. \$15,000.00 on September 19, 1963, which was credited to the capital account. On May 31, 1964 this amount was transferred from the capital account to a loan account of J. P. Maguire & Co.
- (v) Defendants object to this subdivision on the grounds that there does not appear to be any disbursement

in the sum of \$10,586.00 to C. B. Sales Co. on May 31, 1964. Further details are required in order to properly respond.

- (vi) A duplication of (i) above.
- (vii), (viii), (x) and (xi) Defendants objections to each of these subdivisions of this interrogatory on the grounds that there are no disbursements in the sums indicated on the books of Bendyne Ltd. Defendants require further details in order to properly respond to these subdivisions.
- (ix) The payment of \$2,000.00 to Benesco, Inc. on January 30, 1968 was in partial settlement of sums due to Benesco, Inc. on account of advertising services performed for Bendyne Ltd.
- (xii) A payment of \$2,000.00 on April 29, 1968 represented the final payment of the settlement with Benesco, Inc. for advertising services performed for Bendyne Ltd. and was paid to Phillips, Nizer, Benjamin, Krim & Ballon, attorneys for Benesco, Inc.

## Interrogatory:

24. With respect to monthly payments of \$437.00 to Engleman & Co. during the period April 1, 1971 to September, 1972, set forth in complete and precise detail the nature of the expenditures including (a) the address and complete description of any real property rented; and (b) nature of the business for which it was used.

## Response:

24. Monthly rental for residence of defendant Dinerstein. Said payments were credited to Bendyne Ltd. as an offset against advances made by defendant Dinerstein to Bendyne Ltd. in the sum of \$4,000.00 during 1968 and a loan by defendant Dinerstein to Bendyne Ltd. on January 12, 1971 in the sum of \$22,500.00.

#### Interrogatory:

25. With respect to the \$1,107. in payments for automobile insurance set forth (a) identification of the vehicle(s) insured; and (b) nature of the business for which it was used.

#### Response:

25. Defendants object to this interrogatory since plaintiffs have not specified the dates and amounts of the respective payments and defendants are unable to properly respond to this interrogatory without further details.

Dated: New York, New York August 13, 1973

BENDYNE LTD.

By s/ Benjamin Dinerstein
Benjamin Dinerstein, President

# Exhibit 1 Annexed to Defendants' Answers Schedule A

Question 10 a:

Bendyne Lid., employees

1964	Sondra Cruz	Bookkeeper	\$260.00
	Rita Caswell	Sales	400.00
1965	Sondra Cruz Rita Caswell	Bookkeeper Sales	260.00 $400.00$
1966	Sondra Cruz	Bookkeeper	280.00
	Robt. Simpson	Sales	500.00
	Josephine Carroll	Sales	240.00
1967	Sondra Cruz	Bookkeeper	300.00
	Josephine Carroll	Sales	240.00
	Lowell Frischer	Sales	500.00
1968	Sondra Cruz	Bookkeeper	320.00
	Lowell Frischer	Sales	700.00
1969	Sondra Cruz	Bookkeeper	340.00
1970 1971	Sondra Cruz Sondra Cruz Ethyl G. Hobson	Bookkeeper Bookkeeper Sales	340.00 340.00 500.00

The above personnel were employed by Bendyne, Ltd. on the following dates:

Sondra Cruz	August 28, 1964 through July 14, 1972
Rita Caswell	July 17, 1964 through December 17, 1965
Robert Simpson	October 7, 1966 through December 30, 1966
Josephine Carroll	November 4, 1966 through October 6, 1967
Lowell Frischer	October 10, 1967 through August 28, 1968
Ethyl Hobson	July 18, 1971 through November 16, 1972

## Exhibit 2 Annexed to Defendants' Answers Summary Broken Down by Fiscal Year

	Fiscal Year Ended	
	5/31/64	5/31/65
New York Telephone Co.	61.50	160.50
New York Times	5.00	- 000
Coast to Coast Display Serv.	1,610.00	3,456.18
Fleetwood Letter Service	1,089.32	1,563.64
Foilcraft Printing	142.00	_
Ben Sackheim Agency	32,824.71	33,475.27
Conde Nast Publications	135.72	_
Fox Consultants	2,550.07	6,201.61
Advertisement-Project Hope	250.00	_
Advertising Allowances-Customers	10,917.94	7,440.79
Salesgirls-in-Store Promotion	239.65	_
E.E. Finch		2,650.00
Oscar Krauss	_	_
Phyllis Sage	_	1,134.00
Postmaster	_	475.00
Showcase Publishing	_	43.00
Excelsior Window Trimming	_	1,097.77
Metro Photo Service		12.48
Vance Publishing Co.	_	_
American Register		_
Fairchild Publications	_	_
Byrum Publications	_	<u> </u>
Harpers Bazaar	_	_
Modern Mdse. Bureau	_	-
	\$49	\$57,710.24

162a

# Exhibit 2 Annexed to Defendatns' Answers

	Fiscal Year Ended	
	5/31/66	5/31/67
New York Telephone Co.	288.75	72.00
New York Times	200.10	23.85
Coast to Coast Display Serv.	84.10	334.33
Fleetwood Letter Service	150.99	39.97
Foilcraft Printing	255.00	00.01
Ben Sackheim Agency		
Conde Nast Publications		
Fox Consultants	1,922.34	2,631.06
Advertisement-Project Hope	-,	2,001.00
Advertising Allowances-Customers	1,208.05	2,483.61
Salesgirls-in-Store Promotion	-,	2,100.01
E.E. Finch	400.00	8.
Oscar Krauss	6,371.48	
Phyllis Sage	-,	
Postmaster		
Showcase Publishing		
Excelsior Window Trimming		
Metro Photo Service	35.06	
Vance Publishing Co.	620.58	
American Register	57.50	
Fairchild Publications	160.93	114.78
Byrum Publications		1,102.89
Harpers Bazaar		3,388.72
Modern Mdse. Bureau		0,000.12
	\$11,299.78	\$10,191.15

163a

## Exhibit 2 Annexed to Defendatns' Answers

	Fiscal Year Ended	
	5/31/68	5/31/69
New York Telephone Co.	66.25	124.00
New York Times		
Coast to Coast Display Serv.	4,795.30	
Fleetwood Letter Service	565.92	
Foileraft Printing		
Ben Sackheim Agency	4,000.00	
Conde Nast Publications	999.60	2,034.60
Fox Consultants	2,907.60	407.70
Advertisement-Project Hope		
Advertising Allowances-Customers	624.06	4,877.08
Salesgirls-in-Store Promotion		
E.E. Finch		
Oscar Krauss		
Phyllis Sage		
Postmaster		
Showcase Publishing		
Excelsior Window Trimming		
Metro Photo Service		
Vance Publishing Co.	769.25	
American Register		
Fairchild Publications		
Byrum Publications		
Harpers Bazaar	4,955.04	4,018.80
Modern Mdse. Bureau		
	¢10 692 00	¢11 469 19
	\$19,683.02	\$11,462.18

164a

Exhibit 2 Annexed to Defendatns' Answers

	Fiscal Year Ended	
	5/31/70	
New York Telephone Co.	91.00	47.50
New York Times	31.00	41.50
Coast to Coast Display Serv.		
Fleetwood Letter Service	32.01	8.31
Foilcraft Printing	02.01	0.01
Ben Sackheim Agency		
Conde Nast Publications	1,032.72	3,378.76
Fox Consultants	1,002.12	0,010.10
Advertisement-Project Hope		
Advertising Allowances-Customers	689.52	
Salesgirls-in-Store Promotion	000.02	
E.E. Finch		
Oscar Krauss		
Phyllis Sage		
Postmaster		
Showcase Publishing		
Excelsior Window Trimming		
Metro Photo Service		
Vance Publishing Co.		
American Register		
Fairchild Publications		
Byrum Publications		
Harpers Bazaar	2,040.00	
Modern Mdse. Bureau	1,134.75	1,134.75
	\$ 5,020.00	\$ 4,569.32

#### 165a

# Exhibit 2 Annexed to Defendatns' Answers

	$Fiscal\ Year\ Ended\\5/31/72$
New York Telephone Co.	
New York Times	
Coast to Coast Display Serv.	194.29
Fleetwood Letter Service	3,234.50
Foileraft Printing	
Ben Sackheim Agency	
Conde Nast Publications	3,655.50
Fox Consultants	
Advertisement-Project Hope	
Advertising Allowances-Customers	1,714.02
Salesgirls-in-Store Promotion	
E.E. Finch	
Oscar Krauss	3,421.27
Phyllis Sage	
Postmaster	
Showcase Publishing	
Excelsior Window Trimming	
Metro Photo Service	
Vance Publishing Co.	
American Register	
Fairchild Publications	
Byrum Publications	
Harpers Bazaar	
Modern Mdse. Bureau	2,349.00
	\$14,568.58

# Exhibit 3 Annexed to Defendants' Answers Bottling and Packaging

Fessler Bros. 30 West 21st Street New York, N. Y.

#### BOTTLING AND PACKAGING

1964	41,411 bottles	\$2,224.00
1965	22,901 bottles	1,240.46
1966	2,115 bottles	114.56
1967	14,839 bottles	850.16
1968	15,256 bottles	963.54
1969	13,045 bottles	179.74
1970	3,014 bottles	219.77
1971	30,256 bottles	2,206.16
1972	6,852 bottles	717.79

(Verified by Benjamin Dinerstein on August 13, 1973.)

#### Affidavit of Michael C. Silberberg in Support of Foregoing Motion

#### UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

State of New York ) County of New York ) ss.:

MICHAEL C. SILBERBERG, being duly sworn, deposes and says:

- 1. I am associated with the firm of Golenbock and Barell, attorneys for the plaintiff and am fully familiar with the facts of this action.
- 2. I submit this affidavit pursuant to the court's order dated August 10, 1973 to report with respect to defendants' answers to plaintiffs' interrogatories and their effect upon that portion of plaintiffs' motion dated June 6, 1973, which seeks appointment of a receiver of defendant Bendyne and the reasonable expenses incurred in the making of the motion including attorneys' fees.
- 3. As discussed more fully below, defendants' answers to these interrogatories, which are verified by defendant Dinerstein, directly contradict, in several essential respects, sworn statements made by Dinerstein in affidavits and depositions filed in the state court proceeding brought by his brother Charles to dissolve their partnership in defendant C-B Sales Co. (the "state court proceeding") and therefore appear to be perjurious. Taken together with

previous statements made by him in these prior affidavits and depositions, the answers confirm Dinerstein's diversion of Bendyne's assets to himself and his other corporations and confirm the urgent need for the appointment of a receiver of defendant Bendyne so as to prevent the continued dissipation and diversion of profits of "Living Nail" pending the completion of the accounting under the provisions of the interlocutory judgment dated January 4, 1972. Under the judgment, such profits constitute trust money held for plaintiff's benefit by defendants Bendyne and Dinerstein.

- (a) Dinerstein has Utilized Bendyne's Funds to Pay for his Purely Personal Expenses.
- 4. Since argument of the present motion before this Court on July 31, 1973, plaintiffs have had an opportunity to review a deposition in the state court proceeding conducted in two sessions in April and May of 1971 during which Dinerstein was questioned extensively concerning transactions between defendants C-B Sales Co., Bendyne and himself. The following questions and answers from the deposition reveal in astounding detail the extent to which Dinerstein has been using corporate funds of defendant Bendyne to pay for his purely personal expenses while at the same time, taking the position in this action that he has received no salary or compensation from the corporation:
  - Q. Mr. Dinerstein, at the last examination I asked you how you paid your rent at your present premises, and you agreed to take the matter up in consultation with your wife and advise, How did you pay your rent during the month of April? A. From Bendyne, Ltd.
    - Q. Did you pay by check? A. Yes.

Q. Do you pay any other personal expenses from Bendyne, Ltd.? A. Yes.

Q. What are the other expenses you paid during months of January through April of this year? What was the nature of the expenses you paid from Bendyne, Ltd? A. My daily expenses.

Q. Does that include your personal insurance?

A. Yes.

- Q. Does it include your entertainment expenses, personal entertainment expenses? A. Yes.
  - Q. Does it include your automobile? A. Yes.
  - Q. Does it include you medical expenses? A. Yes.
  - Q. Your clothing expenses? A. Yes.
  - Q. Transportation? A. Yes.
  - Q. Telephone? A. Yes.
  - Q. Gas and electricity? A. Yes.

[See pages 68-71 of transcript annexed hereto as Exhibit A]

5. As set forth in my previous affidavits and not specifically denied by Dinerstein in his opposing affidavit, Dinerstein's diversion of assets for his personal benefit continues unabated. Thus, he does not specifically deny that he has caused Bendyne to make payments of \$1,107 for automobile insurance for his Cadillac and \$1,139.90 to the Sylvan garage for parking the Cadillac during the fise in ear ending May 1972. Additionally, he does not specifically deny that he caused Bendyne to pay charges of \$10,658.27 to his American Express account for meals and entertainment. Our examination of the Bendyne books also reveals that there are over \$38,000 in "miscellaneous" charges during the period 1964 through 1972 including meals at the "21" Club, New York Hilton, Drake Hotel, Longchamps, Toot Shor's and the Plaza. When questioned during his deposition in the state court proceeding about similar charges on

the C-B Sales Co. books, Dinerstein took the position that these were "business expenses" but admitted that he kept no records as who was "entertained" on these occasions (see pages 26-27 of transcript annexed hereto as Exhibit B).

- 6. Our examination of the Bendyne books also reveals that he utilized Bendyne funds to pay a \$2,305.39 bill to Appeal Printing Co. for the printing of briefs and record on appeal in the state court proceeding to which Bendyne is not a party—Dinerstein being the only party defendant.
- 7. Dinerstein has also not specifically denied that Bendyne has paid judgments obtained against him personally as a result of transaction entered into by C-B Sales Co.: (i) A judgment in the amount of \$3,225.80 entered against defendant Dinerstein by Coasmire, Inc. in New York Civil Court for goods sold and delivered to C-B Sales: (i' A judgment in the amount of \$63,221 entered against Dinerstein by Olin of New York, Inc. in New York Civil Court based upon rental of station wagon and automobiles for delivery of merchandise to customers of C-B Sales Co.: (iii) A judgment in the amount of \$1,323.52 entered against defendant Dinerstein by Royal Metal Corporation for goods sold and delivered to C-B Sales Co. He also admits that the Bank of Commerce has levied upon the bank account of defendant Bendyne in order to effect repayment of a loan by the bank to C-B Sales Co.
- (b) Dinerstein has Caused Bendyne to Make Payments for Office Space Utilized By his Other Companies
- 8. Dinerstein states in answer to interrogatories that since 1964, Bendyne has been the lessee and has made payments under two leases for rental of office space. The first lease is with Cambridge Management and covers a five year

period prior to February 1971 for 800 square feet of space at 80 East 11th Street. It is stated that the annual rental is \$3,300 plus gas and electricity. The second lease for 1300 square feet at 150 Fifth Avenue is with 150 Estates. It commenced on March of 1971 at an annual rental of \$5,220. (See defendants' answer to interrogatory 6.)

9. In response to interrogatories which seek to elicit whether this space, paid for entirely by Bendyne funds, was utilized by other corporations controlled by Dinerstein during the period January, 1964 to present, Dinerstein admitted that Bendyne Products, Inc. had "shared a desk at the Bendyne, Ltd. premises \* \* \* between the summer of 1965 and approximately November 1966 when Bendyne Products became dormant". He stated that the rent was not apportioned between the two corporations and that therefore Bendyne Products uses the space without reimbursement to defendant Bendyne. (See defendants answer to interrogatory 8.) However, he denied that C-B Sales ever utilized space paid for with Bendyne funds. (See defendants answer to interrogatory 8(a)-(c).) This latter answer directly contradicts Dinerstein's verified account filed in the State Court proceeding on February 10, 1970 in which he states that

"Between January 1964 and June 30, 1969, a substantial portion of the premises leased by Bendyne Ltd. from Cambridge Management Co. was used for the sole purpose of storing merchandise purchased from manufacturers by C-B Sales Co." (See Exhibit F to my previous affidavit—Schedule C).

10. At the time Dinerstein filed the verified proof of claim in the state court proceeding, he placed a value of \$200 a month on the space utilized by C-S Sales which constitutes nearly 75% of the \$275 monthly rental. Thus, C-B

Sales appears to have utilized 75% of the space paid for by defendant Bendyne during this period. Additionally, Dinerstein stated in the verified proof of claim that during the months of January and February 1971, Bendyne funds were used to pay \$1,040 a month for rental on behalf of C-B Sales. (See Exhibit E to my previous affidavit, para. 4).

- 11. Aside from Dinerstein's attempt to conceal the diversion of Bendyne's assets occasioned by the use of Bendyne's funds for space occupied by C-B Sales Co., he appears to have overcharged the corporation for the space in question. The books reflect a charge of \$3,300 per year for rent during the period 1966 to 1970 for the 80 East 11th Street premises (also known as 799 Broadway). The actual rent under the lease with Cambridge Management, however, is not \$3,300 as set forth in answer to Interrogatory 6, or as reflected in the books, but rather is only \$2,400 (See cover and final page of lease annexed bereto as Exhibit C).
- 12. As to Dinerstein's contention that Bendyne Products, Inc. became dormant in November 1966 and did not thereafter utilize office space paid for by defendant Bendyne, it should be pointed out that Dinerstein admits in answer to interrogatories that Bendyne Products, Inc. has at all times since 1966 continued to carry workman's compensation, general liability and property insurance policies (See defendants' answer to interrogatory 11). Bendyne Products also continues to maintain a telephone listing at 150 Fifth Avenue under the number 691-0040, the same number listed for defendant Bendyne and for Bendol, Inc. (A copy of the relevant page of the current Manhattan Telephone Directory is annexed hereto as Exhibit D).

- (c) Dinerstein has caused Bendyne's Employees to Perform Services to Dinerstein's Other Companies.
- 13. In the answers to interrogatories, Dinerstein lists six persons as employees of Bendyne during the period January 1964 to present. One individual, Sondra Cruz, is identified as bookkeeper, and five other persons are identified as performing the function denoted "sales" (See answer to interrogatory 10(a) and annexed Schedule a). Dinerstein also states in the answers to interrogatories that no such person performed services for C-B Sales, Bendyne Products Inc. or Bendol, Inc. during that period. (See answers to interrogatory 10b). This directly contradicts his previous sworn statement in the verified account filed in the state court proceeding where he said that during the period in question "a clerical employee of Bendyne Ltd. performed a substantial amount of services for the benefit of C-B Sales Co." (See Exhibit E to my previous affidavit, Schedule C, pg. 3).
- (d) Dinerstein has Caused Bendyne to Furnish Services to his Other Companies.
- 14. In answers to interrogatories, Dinerstein states that defendant Bendyne at no time since January 1964 paid charges for telephone, cleaning services, electricity, trucking and shipping on behalf of C-B Sales, Bendol and Bendyne Products. (See defendants' answers to interrogatory 12.)\* This answer directly contradicts Dinerstein's previ-

<sup>\*</sup>As part of the answer to interrogatory 12, Dinerstein offers the gratuitous statement not called for by the interrogatory, that C-B Sales Co. provided Bendyne with bookkeeping, telephone and other services in an amount valued at \$17,325 of which he claims only \$3,500 has been paid. He thus, attempts to conceal from plaintiffs and this court, \$12,090 in payments by Bendyne to C-B Sales from September 1964 to March 1969, as set forth in the verified proof of claim filed on behalf of Bendyne in the state court proceeding (See Exhibit F to my previous affidavit—Schedule C).

ous sworn statements in the state court proceeding. There, he stated that \$140.70 was paid by Bendyne for utilities utilized by C-B Sales Co. (See Exhibit E to my previous affidavit, para. 4). It also is contradicted by the fact that Bendel, Inc. and Bendyne Products continue to utilize defendant Bendyne's telephone number (See supra para. 11) and by an entry in Bendyne's books and records dated May 31, 1972 that on that date, there was due to Bendyne from Bendol, Inc. \$102 for telephone and \$115 for freight.

- 15. Dinerstein has also admitted in the state court proceeding that defendant Bendyne furnished the following services to C-B Sales during the period 1964 to present: \$1,650 for xeroxing, \$450 for postage and \$190 for messengers. (See verified claim of Bendyne Ltd., annexed as Exhibit F to my previous affidavit—para. 5, 8 and 9.)
- (e) Dinerstein has Caused Bendyne to Pay for Insurance Policies Utilized by his Other Companies.
- 16. In answer to interrogatories Dinerstein admits that insurance policies for workmans' compensation and liability and property were obtained in the joint names of Bondyne, Ltd., C-B Sales Co. and Bendyne Products during the years of 1964 through 1969 and thereafter in the names of Bendyne Ltd., Bendyne Products, Inc. and Bendol. (See answer to interrogatory 11a.) Despite the fact that the interrogatories have been in defendants' possession since March of this year, they are unable to set forth the manner of apportionment, if any, between these companies. This, of course, merely emphasizes the difficulties plaintiffs have faced in unraveling the maze of inter-company transactions between the Dinerstein complex of corporations. In any event, we do not believe that Dinerstein is being completely

candid since in his verified proof of claim filed on behalf of defendant Bendyne on February 9, 1973 in the state court action stated that Bendyne had paid \$2,101 in insurance policies on behalf of C-B Sales Co. during the years 1964 to present. (See Exhibit E to my previous affidavit, para. 7.)

#### (f) Dinerstein Has Diverted Sales of "Living Nail" to his Other Corporations.

17. In answers to interrogatories, Dinerstein has denied that any of his other companies sold "Living Nail" (See answer to interrogatory 15a). This sharply contrasts with his statements in his verified account in the state court proceeding wherein he stated that during the period September 1963 to June 31, 1969 Bendyne sold \$12,529 in "Living Nail" to C-B Sales for "resale". (See Exhibit F to my previous affidavit, Schedule 6, pg. 1). In his subsequent verified claim, he increased this amount to \$14,544. (See Exhibit E to my previous affidavit, page 6)

#### (g) Dinerstein Has Utilized the Assets of Bendyne to Market Products Other than "Living Nail".

18. In the answers to interrogatories, it has been for the first time revealed in this proceeding that assets of the defendant Bendyne have been utilized for the manufacture and marketing of a product other than "Living Nail". Dinerstein has admitted that since 1968, the corporation has been marketing an aerosol foot spray under the trade name "Living Steps". The corporation's books and records do not reflect any separation of business expenses between these two products and clearly, corporate income has been used by defendant Bendyne to market and promote "Living Steps", a product in which plaintiffs have no interest under the judgment.

- (h) A Receiver is Needed to Prevent Dissipation of Profits from the Sale of "Living Nail" Pending Completion of the Accounting.
- 19. In view of the above, it can be readily seen that defendant Dinerstein is continuing to divert substantial assets of defendant Bendyne to his other companies and to himself. Under the terms of the interlocutory judgment, no salary or other compensation may be deducted by Dinerstein or his family in determining the amount of profits from the sale of "Living Nail". While taking the position that neither he nor his wife have drawn any salary from the corporation since 1964 (see letter to Court from Michael K. Stanton dated September 1, 1972, pg. 2 annexed hereto as Exhibit E), he has admittedly diverted thousands of dollars in corporate funds in payment of purely personal expenses. In light of Dinerstein's attempt to disguise these payments to himself as business expenses on the books and records produced to date, it will take months of laborious analysis of Bendyne's check book (which has not been produced) and the oral deposition testimony of Mr. Dinerstein to trace the full extent of his diversion so as to permit a special master to determine the actual profits from the sale of "Living Nail" as provided in the interlocutory judgment. During such period, Dinerstein will continue to dissipate and divert trust monies under the interlocutory judgment to his own use and to the use of his other companies.
- 20. Accordingly, a receiver is urgently needed to prevent this continued dissipation and diversion of Bendyne's assets; to trace past diversion of assets so as to assist the Court in determining the amount of profits from the sale of "Living Nail" and to pursue claims on behalf of Bendyne against Dinerstein for costs and misappropriation of corporate assets. In light of Dinerstein's incredible testimony during his deposition in the state court proceeding

that in the period July 1970 to May 5, 1971 he "walked around with" and "spent" \$40,000 in eash withdrawn from a savings account which had been secreted from the receiver in that action, (see pages 127-130 of Transcript annexed hereto as Exhibit F), it is highly unlikely that plaintiffs will ever recover the profits from the sale of "Living Nail" absent the immediate appointment of a receiver for Bendyne.

21. We therefore respectfully renew our request that such a receiver for defendant Bendyne be appointed forthwith. Additionally, in light of the failure of defendants to offer any excuse for their delay in answering plaintiff's interrogatories, we again request the award of the cost, including reasonable attorneys' fees, for that portion of our motion of June 5, 1973 which resulted in an order compelling such answers.

/s/ Michael Silberberg

(Sworn to September 4, 1973.)

# Exhibit A Annexed to Affidavit of M. C. Silberberg Pages 68-71 of Transcript

(68)

# SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF NEW YORK

[SAME TITLE]

Deposition of Benjamin Dinerstein, taken before C. Lorraine Simon, Notary Public of the State of New York, at the offices of Bandler, Goldstein & Kagan, Esqs., 275 Madison Avenue, New York, New York, on Wednesday, May 5, 1971, at 10:15 a.m., pursuant to Subpoena (continued).

(69)

#### Appearances:

Bandler, Goldstein & Kagan, Esqs., Attorneys for Judgment Creditor, 275 Madison Avenue, New York, New York, By: Robert Kagan, Esq., of Counsel.

Michael K. Stanton, Esq., Attorney for Judgment Debtor, 767 Fifth Avenue, New York, New York.

BENJAMIN DINERSTEIN, having previously been duly sworn, continued his testimony as follows:

#### Examination by Mr. Kagan:

Q. Mr. Dinerstein, at the last examination I asked you how you paid your rent at your present premises, and you agreed to take the matter up in consultation with your wife and advise.

#### Exhibit A Annexed to Affidavit of M. C. Silberberg

How did you pay your rent during the month of April?

A. From Bendyne, Ltd.

Q. Did you pay by check? A. Yes.

Q. Did you pay any other personal expenses from Ben-

dyne, Ltd? (70) A. Yes.

- Q. What are the other expenses you paid during the months of January through April of this year? What was the nature of the expenses that you paid from Bendyne, Ltd.? A. My daily expenses.
  - Q. Does that include your personal insurance? A. Yes.

Q. Does it include your food expenses? A. Yes.

Q. Does it include your entertainment expenses, personal entertainment expenses? A. Yes.

Q. Does it include your automobile? A. Yes.

- Q. Does it include your medical expenses? A. Yes.
- Q. Your clothing expenses? A. Yes.
- Q. Transportation? A. Yes.

Q. Telephone? A. Yes.

Q. Gas and electricity? (71) A. Yes.

- Q. Do you make withholding with respect to those payments, Mr. Dinerstein? A. I don't know what you are referring to.
- Q. Does the company withhold any portion of that standard payment of taxes? A. I don't know.

Q. Can you find out? A. Yes.

- Q. Do you get paid any salary by Bendyne, Ltd.? A. No.
- Q. Do you get any cash payments from Bendyne, Ltd. in any form? A. No.
- Q. Would you also find out whether or not any Social Security withholding is paid with respect to these payments that we have referred to? A. Yes.

Q. Unemployment insurance payments? A. Yes.

Q. You indicated that Bendyne, Ltd. pays your insurance. What is the nature of the insurance policies that you have on your life? A. National Service Life.

# Exhibit B Annexed to Affidavit of M. C. Silberberg Pages 26-27 of Transcript

# SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF NEW YORK

[SAME TITLE]

Deposition of Benjamin Dinerstein, taken before Beatrice Levy, Notary Public of the State of New York, held at the offices of Bandler, Goldstein & Kagan, Esqs., 275 Madison Avenue, New York, New York, on April 21, 1971, at 10:30 a.m., pursuant to adjournment.

- (26) Q. I refer you to the next item, 3784, IRS Installment, B and F, \$300. What was that? A. Personal.
- Q. In other words, C. B. Sales Co. made a payment on behalf of yourself? A. Personal.
  - Q. On behalf of yourself? A. Yes.
- Q. And the item which indicates check number 3786, that was also paid on behalf of you and your wife? A. Yes.
- Q. Item check number 3850, Longchamps, \$105.76. What is that item? A. Business.
  - Q. What was the nature? A. A business expense.
- Q. Was that for more than one lunch, more than one dinner, or what? A. Yes.
- Q. And do you have records as to who they were expended on behalf? A. No.
- (27) Q. In other words, you don't maintain any records as to on whose purpose they were expended? A. I didn't keep that.
  - Q. Excuse me? A. I didn't keep that.

## Exhibit B Annexed to Affidavit of M. C. Silberberg

Q. And the only way then we know that these are business is because that is your recollection? A. Because I know.

Q. You know. Tell me how do you know? A. Because

I know.

Q. How do you know? A. If I took somebody for a business lunch I know that I took them for a business lunch.

Q. I see. And do you know what period that \$105 would cover? A. It usually was a monthly period.

Q. Where is the particular Longchamps that you went to for these purposes? A. 12th Street and Fifth Avenue.

Q. Did you ever use that account for your own personal purposes? A. Not necessarily.

Q. Yes or no? A. No.

# Exhibit C Annexed to Affidavit of M. C. Silkerberg Agreement of Lease Dated October 26, 1965

(See Opposite 😭)

L3/62

AUTURNITH IN TERRIST, made as of this 26th day of CAMBRIDGE MANAGEMENT CORP.

Naty of the first part, hereinafter referred to as LANDLORD, and BENDYNE LTD.

party of the second part, here Illitururiff; Landlord hereby leases to Tenant and Tenant hereby hires from L as now divided and occupied.

In the building known as 799 Broadway in the Borough of Manhattan City of New York, for the

, City of New York, for the term of five (5) years

(or until such term shall sooner cease and expire as hereinalter provided) to commence on the ny of Caracas and the nineteen hundred and sixty-five, and to end on the ny of September

both dates inclusive, at an annual rental rate of TWO THOUSAND FOUR HUNDRED (\$2,400.00)

which Tenant arrees to pay in tructil money of the United States which shall be levest londer in payment of all delute and there. trin, at the office of Landlard or part other place as Landlard may designate, without any set off or defuction whether were mblic and private, at the time of payment, in equal monthly installments in advance, on the lirat day of each month dinura and monthly installmental on the execution hereof (unless this feared be a renewell). xccpt that Tenant shall pay the first

In the event tied, at the commencement of the letm of this better, or thereafter, Tenant shall be in challed in the payment of tont to Londhad pursuant to an in-The parties hereto, for themselves, their hoirs, clientitutions, executors, administrators, legal representatives, successors mount of such converses to any monthly invisionent of rest pryother however and the pane shall be puyable to Landlord as additions from

1. Tonant shell pay the rest as shown and as hereinates for Office, show room and utockroums. and assigns, hereby covenant as follows:

#### "D" Annexed to Reply Affidavit of Edward A. Wagner

and for no other purpose.

1. Trayen shouly pay the trail at the county demised premises for Ulitee, show room and ulockroum.

The Perting hereto, for thomselves, their hoirs, distributions, executors, administrators, loud representatives, rucces.

ne acciona, hereby covenant as follows:

Lous. ....

10 that of an iner lease with Landbord or ... Landbord's produced at the press. Limbered may at Landbord's option and without notice to the month of each consulted to any monthly historical property in market and the fame shall be payable to Lindlard as additional run. In the event that, at the commencement of the term of this harm, or thereafter. Transt shall be in changing in the payment of rout to Lan-

monthly installments on the execution hereof (unless and water

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CAMBRIDGE MANAGEMENT CORPGERS

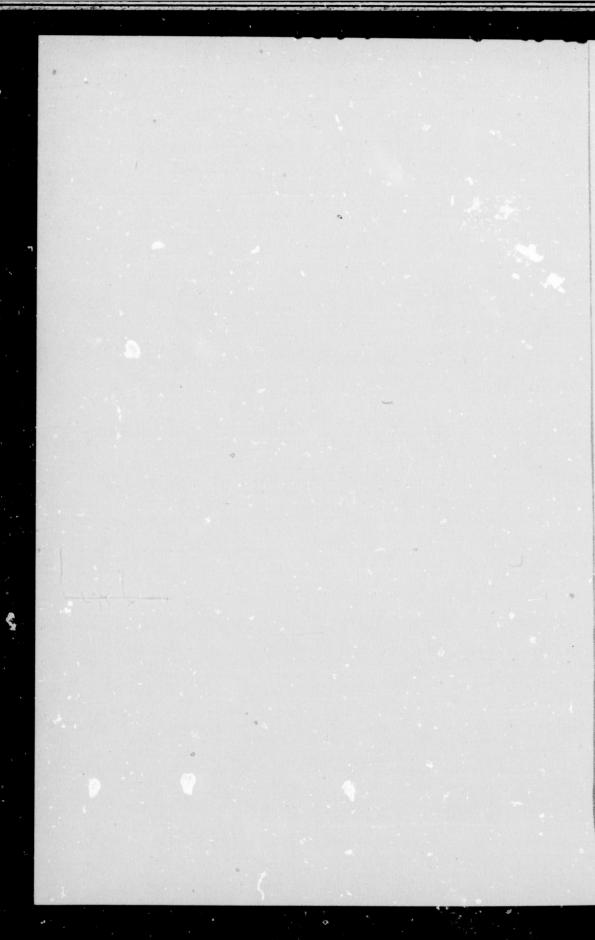
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### Exhibit D Annexed to Affidavit of M. C. Silberberg Page 154 of New York County Telephone Directory

(See Opposite 😥)

### Exhibit E Annexed to Affidavit of M. C. Silberberg Letter Dated September 1, 1972

(Same as Letter printed herein at page 40a.)

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### Exhibit F Annexed to Affidavit of M. C. Silberberg Pages 68, 127-130 of Transcript

(68)

# SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF NEW YORK

#### [SAME TITLE]

Deposition of Benjamin Dinerstein, taken before C. Lorraine Simon, Notary Public of the State of New York, at the offices of Bandler, Goldstein & Kagan, Esqs., 275 Madison Avenue, New York, New York, on Wednesday, May 5, 1971, at 10:15 a.m., pursuant to Subpoena (continued).

- (127) Did you have any savings accounts during that period? A. No.
  - Q. None at all? A. Not that I know of.
  - Q. Did you have none, or don't you know of any? A. No.
- Q. Do you have any savings accounts at the Fulton Savings Bank? A. No.
  - Q. Kings County? A. No.
- Q. I show you copies of checks drawn by the Fulton Savings Bank and ask you if you are familiar with these checks? A. Yes.
- Q. Did you have an account in the Fulton Savings Bank and Kings County? A. I evidently did.
  - Q. Mr. Diner tein, did you or didn't you? A. Yes.
- Q. So that the statement that you previously made that you never had any savings accounts, was not a truthful one? (128) A. I don't know. You were referring to that particular day, and I don't know that day I didn't have it.
- Q. During the year 1970 did you have any savings accounts?

## Exhibit F Annexed to Affidavit of M. C. Silberberg

Mr. Stanton: I think he corrected his answer. He said yes, the Fulton Savings Bank.

Q. Do you have any other savings accounts? A. No.

Q. How much did you have in that savings account during the year 1970? A. I don't know the exact amount.

Q. Was it in excess of \$10,000, Mr. Dinerstein? A. Yes.

Q. What did you do with the proceeds of those checks?

A. Spent it.

Q. How did you spend it? A. On myself.

Q. Did you deposit it anywhere else? A. No.

Mr. Kagan: Would you mark them as JC Exhibits 7A, 7B and 7C, respectively.

(Documents referred to above received and marked respectively, JC Exhibits 7A, 7B and 7C for (129) identification.)

Q. Mr. Dinerstein, I have added up these checks and

they add up to in excess of \$40,000.

You have been telling us that you spent all of this \$40,000 since the date of withdrawal in July of 1970?  $\Lambda$ . Yes.

Q. And you have no part of that \$40,000 at this time?

A. Yes.

Q. Mr. Dinerstein, did you deposit any part of these moneys in an account in the First Israel Bank and Trust

Company? A. I don't know.

Q. I show you your endorsement on the reverse side of these checks and the stamp on them of the First Israel, and ask you whether or not you deposited them in that bank? A. No.

Q. Were they cashed for you in that bank? A. Yes.

Q. What did you do with the proceeds at that time?

A. Spent it.

### Exhibit F Annexed to Affidavit of M. C. Silberberg

Q. You mean you walked around with \$40,000? A. Yes. (130) Q. And you never deposited any part of that \$40,000 anywhere prior to spending it? A. No.

Q. What did you do with the \$3,000 that you got from John Caprice? What did you do with that? A. Spent it.

Q. Never deposited it anywhere? A. No.

Q. Mr. Dinerstein, prior to July 3, 1970, between let's say April of 1968 and July 3, 1970, did you have a savings

account at the Manhattan Savings Bank? A. No.

Q. Mr. Dinerstein, I show you a question and answer on a subpoena that I have received from the Manhattan Savings Bank, which indicates that you had a savings account between the dates April 3, 1968 and July 3, 1970 in the Manhattan Savings Bank, and ask you if that would refresh your recollection? A. I don't know.

Q. Did you or did you not have a savings account in

that bank? A. May have.

Q. May have or did you or didn't you? Please answer yes or no.

#### Affidavit of Benjamin Dinerstein in Opposition to Foregoing Motion

#### UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

State of New York ) County of New York ) ss.:

Benjamin Dinepstein, being duly sworn, deposes and says:

- 1. I am the individual defendant in this action and the President of Bendyne Ltd., and I am familiar with the background of this action and the statements set forth herein.
- 2. I respectfully submit this affidavit to the Court to qualify certain inaccuracies set forth in the affidavit of Michael C. Silberberg, Esq., sworn to on September 4, 1973, and in further opposition to plaintiffs' application for the appointment of a Receiver for Bendyne Ltd.

#### Background of this Action

3. In essence, except for the claim of Ansalt Dynos against Mavala, Inc. for goods sold and delivered, this is an action wherein plaintiffs allege that they are owners of a unique secret formula incorporated in a nail hardening product sold by them under the name "Mavala Scientifique". They further claim that as owners of this unique formula, they imparted certain information to me concerning the formula and that I wrongfully misappropriated

#### Affidavit of Benjamin Dinerstein

such information and used same in connection with the preparation of the formula for a nail hardening product known as "Living Nail", which is manufactured and sold by Bendyne Ltd.

- 4. As has been demonstrated to the Court repeatedly, the formullae of 'Marvala Scientifique' and "Living Nail" are not identical or similar. This has been demonstrated by the testimony of Cyril Kimball of Foster B. Snell, Inc., and chemical tests performed by Foster B. Snell, Inc. would show that the two formullae are quantatively and qualitively distinct. The fact that a patent has been obtained on the formula for "Mavala Scientifique" in and of itself demonstrates that said formula is different and unique. To the contrary, the formula of "Living Nail" it not patentable and is in the public domain.
- 5. Plaintiffs also claim that I had diverted to Bendyne, contrary to my fiduciary obligation to Mavala, Inc., a patent application for my personal invention. This application was made by me on January 25, 1963 and was submitted to the United States Patent Office. This patent application was rejected by the United States Patent Office as not patentable. Thereafter and in January, 1964, over one year after the rupture of my relationship with the plaintiffs, I submitted an application for a patent on a new and distinct invention which ultimately received a patent number from the United States Patent Office.
- 6. It is against this uncontradicted factual framework that plaintiffs request that this Court appoint a Receiver for Bendyne Ltd. to prevent alleged diversion of profits arising out of the sale of Living Nail". It must be obvious to the Court that this drastic remedy would result in the destruction of Bendyne Ltd. and the immediate termination

of the ten years' effort that I and my wife have devoted to the marketing, promotion and sale of this product in direct competition with plaintiffs' product "Mavala Scientifique".

- 7. The underlying thrust of plaintiffs' claim is that the "secret formula" of "Mavala Scientifique" implies some proprietary right held by them with regard to the concept of the use of a formaldehyde solution in water for the purpose of hardening nails. What plaintiffs have not disclosed to the Court is that an attempt on their part to procure a patent of such broad scope was specifically rejected by the United States Patent Office. In the course of such rejection the Patent Office noted that the concept of such a broad scope had been disclosed as far back as 1916 and was therefore in the public domain when Madame Van Landegham's application seeking such a finding was rejected as unpatentable.
- 8. It will attempt, point by point, to rebut the argument advanced by Mr. Silberberg with respect to the conduct of the business of Bendyne Ltd.

## Personal Living Expenses

9. There is no dispute that for a period of time in 1971, certain of my personal expenses were paid from the account of Bendyne Ltd. However, these expenses were debited against outstanding loans made by me to Bendyne Ltd. aggregating \$26.500 as of January 12, 1971 (see response to Interrogatory 24). In addition, it is not disputed that payments were made from Bendyne Ltd. for automobile expenses on a 1°52 Cadillac which I owned in 1971-1972 and for parking charges incurred in connection with that vehicle. This vehicle throughout the pertinent period was used solely for the benefit of Bendyne Ltd. An examination of

the Bendyne Ltd. records demonstrates that no vehicles were owned by the corporation between 1971 up until the present time. It is submitted that since the vehicle was used solely for the business of Bendyne Ltd., the automobile insurance and monthly parking charges are proper business expenses.

- 10. There is no dispute that Bendyne Ltd. paid charges of approximately \$10,600 in the eight-year period between January, 1964 and May, 1972. These expenses were for business travel, business entertainment, trade show rentals, and entertainment with respect to trade shows of customers manufacturers, sales representatives and related business purposes. In addition, some of these expenditures covered entertainment of editors and writers in the cosmetic field and similar type items. It is respectfully submitted that an average expenditure of approximately \$100 per month during the period involved is reasonable and a customary expense.
- 11. With regard to the unitemized reference to \$38,000 in miscellaneous expenses, I cannot fully respond to this aspect of Mr. Silberberg's affidevit except that a substantial portion of expenditures made to the New York Hilton, the "21 Club" and Longchamps dealt with trade show expenses and customer and sales representative entertainment in connection with such shows.
- 12. There is no dispute that the sum of \$2,305.39 for printing expenses in unrelated litigation is a personal expense and a proper offset against the loans in the aggregate sum of \$26,500 referred to in the response to Interrogatory 24.
- 13. With respect to payment of judgments from the Bendyne Ltd. bank account at The Bank of Commerce as

described at Pages 4 and 5 of Mr. Silberberg's affidavit, said judgments in the following amounts were paid from my personal checking account at The Bank of Commerce rather than from the account of Bendyne Ltd.:

(a) Cosmair, Inc.	\$3,225.80
(b) Olin of New York, Inc. (not \$63,221.00 as set forth in Mr. Silberberg's	
affidavit)	632.21
(c) Royal Metal Corporation	1 323 52

14. I apologize to Mr. Silberberg and to this Court for any confusion that may have been created by my statement in the Proof of Claim that these moneys had been paid out of the Bendyne Ltd. account. They were not. To repeat, my personal account was the source of the payment of the aforesaid three judgments, together with a fourth judgment procured by the Bank of Commerce.

## Office Space Payments

15. I pointed out to the Court in response to Interrogatory 8(a) that Bendyne Ltd. used a portion of C. B. Sales Co. for space for office purposes. Contrary to Mr. Silberberg's assertion, Bendyne Ltd. did not make payments for office space utilized by C. B. Sales Co. Rather, as claimed in the State Court proceedings, C. B. Sales Co. used part of Bendyne Ltd. storage space. In fact, no rent was apportioned, and at the present time this matter is an unresolved dispute in the State Court proceedings. I repeat, Bendyne Ltd. did not provide office space for C. B. Sales Co. and my attempts to recover a reasonable amount to reimburse Bendyne for the storage space utilized by C. B. Sales Co. is not a contradiction of the statements set

forth in the Interrogatories or in the verified account dated February 10, 1970.

16. Mr. Silberberg is inaccurate when he claims that the rent under lease with Cambridge Management Corp. calls for annual payments of \$2,400 rather than \$3,300. Room 99 (as described in Exhibit C) was merely one of the spaces leased to Bendyne Ltd. Bendyne also leased several cellar storage areas from Cambridge Management Corp. at the same premises resulting in a total annual rental of \$3,300. It is not disputed that Bendyne Products, Inc., though dormant, was designated as a named insured on certain insurance policies. Since I understand Workmen's Compensation coverage is based upon the salaries paid, no expenses have been incurred as a result of naming Bendyne Products, Inc. as an additional assured. The only expenses involved are annual corporation franchise fees and the expense regarding telephone listings.

## Use of Bendyne Employees

17. I respectfully submit to the Court that Mr. Silberberg's attempts to establish contradiction between the answered Interrogatory 10(a) and the verified account in the State Court proceedings is highly erroneous and misleading. Interrogatory 10(a) asked for the names of individuals employed by Bendyne Ltd. Interrogatory 10(b) asked whether any Bendyne Ltd. employee performed services for any corporation identified in response to Interrogatories 2 and 3 above. The answers to Interrogatories 2 and 3 refer only to Bendyne Products, Inc. and do not in any way apply to Bendol, Inc. or C. B. Sales Co. Mr. Silberberg has obviously misconstrued the interrogatories which he propounded and the answers given.

18. In my response to Interrogatory 12 regarding telephones, cleaning services and related items, I forgot a \$140 item which had been paid for utilities in connection with rent at 80 East 11th Street. While I do not doubt that there might be an entry in the Bendyne Ltd. books and records that there were payments due from Bendol, Inc. in the sum of \$102.00 for telephones and \$115 for freight, I have no personal knowledge of these charges and my attention was not directed to them by plaintiffs' interrogatories. With regard to my attempts to recover certain charges from C. B. Sales Co. for xeroxing, postage, etc., which have been asserted, these charges have not been apportioned and are the subject of a pending dispute.

## Sales of "Living Nail"

18. Interrogatory 15(a) asked whether "Living Nail" had been sold by any company other than Bendyne Ltd. I construed such interrogatory to be addressed to the sale of the product at wholesale to Bendyne Ltd. customers. The merchandise delivered to C. B. Sales Co. for resale at retail by C. B. Sales Co. does not, in my opinion, present any contradiction. C. B. Sales Co. was treated as a customer of Bendyne Ltd., such as many other wholesale beauty suppliers, drug stores and other cosmetic outlets.

## Sale of "Living Steps"

19. When Bendyne Products, Inc. became dormant, I caused the inventory to be transferred to Bendyne Ltd. Bendyne Ltd. had not expended any moneys for the promotion of the product and has not "marketed" the product. In essence, whenever an inquiry for an order was received for "Living Steps," Bendyne Ltd. achieved the benefit of any such sale at no expense. The records of Bendyne

Products, Inc. were at all times separately maintained. Mr. Silberberg's distortion of the underlying facts is an obvious attempt to mislead the Court to the conclusion that some detriment has resulted to Bendyne Ltd. Clearly the contrary is the direct result, to wit, Bendyne Ltd. received the proceeds of sale for merchandise which it has never paid for.

- 20. Ash & Parsont, Certified Public Accountants, who have been in charge of the books and records of Bendyne Ltd. from the inception of the business until the present time, were present at my attorneys' offices when plaintiffs' accountants commenced their examination of the records. Plaintiffs' accountants had access to all of Bendyne Ltd.'s records, books and tax returns for over five months. No questions were ever presented to representatives of Ash & Parsont, except for a request for copies of income tax returns and certain work papers, which requests, I am informed, were complied with. Representatives of Ash & Parsont are available to respond to any inquiries which plaintiffs' accountants may have. In addition, my wife. who is generally familiar with the records, is also available for questioning as am I. I believe that plaintiffs' motion for the appointment of a Receiver of Bendyne Ltd. is an attempt to eliminate a source of competition that plaintiffs have been fighting for over ten years.
- 21. Under these circumstances it would appear that the drastic remedy of the appointment of a receiver, which would in all probability be the death knell of the business of Bendyne Ltd. and the efforts that I and my wife have expended for over ten years, and should be denied, or, in the alternative, a full evidentiary hearing on the issues presented should be conducted by the Court.

- 22. As a further alternative, the Court may obviously direct that the issues of whether or not any profits have been earned as the result of the business of Bendyne Ltd. should be referred to a Special Master, as specifically directed in the interlocutory judgment entered herein by Mr. Justice Solomon.
- 23. I respectfully submit to the Court that plaintiffs have not in any way demonstrated to the Court that the cumulative losses set forth in the income tax returns of Bendyne Ltd. are erroneous. If any such evidence is available to plaintiffs, same should be presented to the Court or to a Special Master.

Wherefore, I respectfully submit that plaintiffs' motion for the appointment of a Receiver, which application is based solely on the affidavits of counsel for the plaintiffs, should be denied in all respects.

Benjamin Ding stein

(Sworn to September 19, 1973.)

## Reply Affidavit of Michael C. Silberberg in Support of Foregoing Motion

#### UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

State of New York ) County of New York ) ss.:

MICHAEL C. SILBERBERG, being duly sworn, deposes and says:

- 1. I am associated with the firm of Golenbock and Barell, attorneys for plaintiffs and am fully familiar with the facts in this action.
- 2. I submit this affidavit in reply to the affidavit in opposition of Benjamin Dinerstein and in further support of plaintiffs' motion dated June 5, 1973 for the appointment of a receiver for defendant Bendyne, Ltd. together with the award of reasonable expenses incurred in the making of the motion including attorneys' fees.
- 3. Mr. Dinerstein, faced with blatant and irreconcilable contradictions between statements made under oath in this proceeding and in the prior state court proceeding brought by his brother concerning his operation of defendant Bendyne, has now attempted in his affidavit to "explain" them away by stating inter alia that certain prior answers were "mistakes" or in other instances that he "misunderstood" interrogatories propounded by plaintiffs. He also attempts to justify his use of Bendyne's funds for payment of admittedly personal expenses as repayment of "loans" made by him to the corporation. As discussed more fully below,

these new assertions are no more believable than his prior statements and it is now abundantly clear that he has manipulated the affairs of defendant Bendyne so as to pay his purely personal expenses and expenses of his other companies, thus dissipating the profits of Bendyne which constitute trust monies held for plaintiff Tinsley's benefit under the interlocutory judgment dated January 4, 1972. Accordingly, plaintiffs' motion for the appointment of a receiver for defendant Bendyne should be in all respects granted.

4. Initially, it should be observed that Dinerstein, in paragraphs three through seven of his affidavit attempts to divert the attention of this court from the real issues presented by this motion by seeking once again to argue that he did not breach any fiduciary obligations to plaintiff Tinsley. He, of course, ignores findings to the contrary by District Judge Edward Weinfeld on plaintiffs' motion for preliminary injunction and District Judge Solomon, after Both found that Dinerstein had diverted the full trial. nail protector shield paid for by Mavala to his corporation, defendant Bendyne. Dinerstein also ignores this court's decision dated May 1, 1973 denying his motion for an order modifying the judgment in which these same tired arguments were presented in the form of "newly discovered evidence". At that time, the court characterized the motion as "merely a 'frivolous attempt to delay' the conclusion of this litigation".

#### I

## Dinerstein's "Explanations" of his Contradictory Statements Should be Rejected

5. In my previous affidavit in further support of the motion for the appointment of a receiver dated September 4, 1973, (my "previous affidavit") I discuss in detail the

numerous instances in which Dinerstein furnished answers to plaintiffs' interrogatories which directly contradict his sworn statements in the state court proceeding. These prior inconsistent statements confirm the extent to which he has utilized Bendyne's funds to pay for his purely personal expenses and for expenses incurred by his other companies. In the face of these blatant contradictions, Dinerstein, in his opposing affidavit, now offers some wildly improbable "explanations". For the reasons stated below they should be in all respects rejected.

## Payments by Bendyne, Ltd. for Office Space Utilized by Other Corporations.

- 6. As we have previously pointed out, Bendyne, Ltd.'s funds have been used to pay for office space utilized by Dinerstein's other companies. Dinerstein denied this in his answers to interrogatories—answers which are clearly perjurious in light of his sworn statements in the state court proceeding. (See my previous affidavit ¶8-12.)
- 7. Dinerstein now takes the position in his affidavit in opposition that he misunderstood the interrogatories and did not reveal the use by C-B Sales Co. of Bendyne space because he did not believe that interrogatory 6 which asked for identification of "each office maintained by Bendyne for the transaction of business" and identification of "each lease" for rental of space thereof required him to identify "storage" space located at any such office. In light of Dinerstein's answers to interrogatory 6 which is specifically phrased in terms of the "premises" rented at 80 East 11th Street and which specifically includes the basement area of the building, this "explanation" is weak indeed. Clearly, Dinerstein when he answered the interrogatory, attempted to conceal from plaintiffs and this court the use by C-B Sales of this storage area which constitutes 75% of the total space rented with Bendyne funds.

8. In answer to interrogatory 6, Dinerstein also took the position that there was only one lease covering the 11th Street address:

"At 80 East 11th Street, Cambridge Management Corp. was lessor and Bendyne, Ltd. was lessee. The lease was for a period of five years with the annual rent of \$3,300 plus gas and electricity. Bendyne rented approximately 500 square feet of space plus basement space of approximately 300 square feet."

In my previous affidavit I annexed a copy of the actual lease for the 11th Street address which shows a rent of \$2,400 thus revealing a \$900 per year overcharge to Bendyne and another untruthful answer. Dinerstein now "explains" that the annexed lease is merely one of several leases having a total rent of \$3,300. He does not annex the remaining leases which account for the \$3,300 charge nor does he even attempt to set forth the details thereof. Accordingly, this spurious "explanation" should be rejected.

## Sales of "Living Nail" by Dinerstein's Other Corporations.

9. In answer to interrogatory 15a, Dinerstein denied that any of his other companies sold "Living Nail". When faced with his previous sworn statement in the state court proceeding that substantial quantities of "Living Nail" were delivered to C-B Sales Co. for "resale", he now admits to sales of "Living Nail" by that corporation. He opines that there is no contradiction between the interrogatory answer and the previous statement since he "construed" the interrogatory, "to be addressed to the sale of the product" at wholesale to Bendyne, Ltd. customers. (Dinerstein affidavit, ¶18) This feeble explanation again reveals Dinerstein's willful attempt to withhold informa-

tion in connection with the accounting from plaintiff and this court.

Payments by Bendyne for Services Furnished to Dinerstein's Other Corporations.

10. As discussed in my previous affidavit, Dinerstein stated in answer to plaintiffs' interrogatories that Bendyne at no time since January, 1964 paid charges for telephone, cleaning service, electricity, trucking and shipping on behalf of C-B Sales, Bendol and Bendyne Products. (See my previous affidavit, ¶4). These answers are directly contradicted by his previous sworn statements in the state court proceeding in which he detailed such payments and demanded reimbursement. Dinerstein now states that he "overlooked" these charges when he answered the interrogatories. Curiously, he did not "overlook" them when he prepared his proof of claim in the state court proceeding.

Judgments Paid by Bendyne on Behalf of Dinerstein and his Other Companies.

11. We previously pointed out that Dinerstein has caused Bendyne to pay judgments obtained against him personally as a result of transactions entered into by C-B Sales Co. (See my previous affidavit, ¶7) These facts were elicited from Dinerstein's verified proof of claim filed in the state court proceeding. Dinerstein now takes the position that previously sworn statements were a mistake and in fact these judgments were paid from his personal bank account. He offers no documentary evidence to support this new contention and neither does he state that he has taken any steps to amend the proof of claim. Accordingly, we submit that this "explanation" should be accorded little weight.

#### II

#### The "Loan" Transactions

- 12. We are indeed gratified that Mr. Dinerstein, when faced with his deposition testimony in the state court proceeding has finally admitted that he caused Bendyne, since the entry of the preliminary injunction in 1964, to pay for many of his purely personal expenses such as insurance and parking charges for his automobile, rent for his apartment and expenses incurred in connection with personal litigation, food, life insurance, etc. He attempts to now justify these expenditures of corporate funds as repayment of "loans" that he, from time to time, made to defendant Bendyne. Thus, he contends that while receiving no salary from the corporation since 1964, living in a \$437 a month apartment and driving a Cadillac automobile, he has somehow managed to accumulate \$25,000 to "loan" to the corporation. The suggestion that the funds placed in the corporation as "loans" were his personal property, especially where he has now admitted to sales of "Living Nail" by his other companies and in light of his failure to offer any explanation as to the source of the monies, is no more believable than the many other statements Dinerstein has made under oath in this proceeding and which have been shown to be categorically false.
- 13. Yet, even assuming for the moment that the monies which he "loaned" to Bendyne were not in fact income from the sale of "Living Nail" which had been diverted to these other companies or to himself personally, the transactions do not appear from the facts to be loans at all but rather, appear to constitute contributions of capital. Thus, there are (a) no notes produced to date which evidence the loans; (b) no claimed repayment schedule and (c) no interest charged to Bendyne. These facts are hardly consistent with a bona fide loan. Indeed, Dinerstein ap-

pears to have used the transactions to belatedly account for large and persistent withdrawals of cash from the corporation. This appears from the following pencilled notation by his accountant in the worksheets which were produced for our inspection:

"I spoke to B. Dinerstein about large amounts of checks to cash—charge large amounts to loan account & small amounts to selling expenses [!]"

- 14. Manifestly, the "loan" transactions far from justifying Bendyne's payment of Dinerstein's admittedly personal expenses merely demonstrate the extent to which Dinerstein has been able to unilaterally manipulate the form and substance of Bendyne transactions to plaintiffs' detriment.
- 15. Under the terms of the interlocutory judgment, Dinerstein is not permitted to deduct salary or other compensation in determining the net profits of the business in this accounting. He has, however, admittedly placed himself in the position of having defendant Bendyne pay for the full range of his personal living expenses, while at the same time claiming that no salary or other compensation has been paid to him. He has accomplished this result by the unfettered ability to control transactions between defendant Bendyne, himself and his other companies and to withdraw cash from the corporate till.

#### III

## A Receiver Should be Immediately Appointed

16. As can be seen from the foregoing, Dinerstein, while maintaining that defendant Bendyne has incurred a net loss of over \$56,000 since 1964 despite the absence of any payment in salary to himself or his wife, has never-

theless, by his complete control of the day-to-day affairs of the corporation caused Bendyne to pay thousands of dollars in payment of his purely personal expenses and to make other substantial payments for expenses incurred by his other companies. These payments which were in the form of eash withdrawals have only been uncovered after painstaking review of prior statements made in the state court proceeding. Indeed, as pointed out in my previous affidavit, it will take months of laborious analysis of the Bendyne checkbook which is yet to be produced, analysis of books and records of his other companies and the extensive deposition of defendant Dinerstein to uncover the full extent of his diversion so as to permit a special master to determine profits from the sale of "Living Nail" as provided in the interlocutory judgment.

17. Plaintiffs' prospects for ultimately recovering these diverted monies absent the immediate appointment of a receiver are slim indeed. As we have previously pointed out, Dinerstein secreted bank accounts totaling \$40,000 from the court-appointed receiver in the state court proceeding. When the accounts were discovered by the receiver and Dinerstein was asked during his deposition for the whereabouts of the money which had since been withdrawn, he testified that he "walked around with it" and "spent" it. (See my previous affidavit para. 20.)

18. We therefore respectfully request that plaintiffs' motion be in all respects granted.

Michael C. Silberberg

(Sworn to October 1, 1973.)

## Supplemental Affidavit of Benjamin Dinerstein in Opposition to Foregoing Motion

#### UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

State of New York ) County of New York ) ss.:

Benjamin Dinerstein, being duly sworn, deposes and says:

- 1. I am the individual defendant in this action and the President of Bendyne Ltd., and I respectfully submit this supplemental affidavit to the Court in connection with certain matters which I am advised were raised during the course of oral argument before the Court on October 16, 1973 and in opposition to plaintiffs' motion.
- 2. I understand that questions were raised by the Court with respect to payment for garage rental and automobile expenses by Bendyne Ltd., as well as the payment of my apartment rental during a limited portion of 1971 and 1972. In addition, I understand that plaintiffs' counsel again attempted to assert that Bendyne Ltd. and I were in some way intertwined with Benesco, Inc., despite my Response 23(ix) and (xii) to plaintiffs' interrogatories, which clearly demonstrates that Benesco, Inc. is an independent advertising agency which performed services for Bendyne Ltd. which ultimately resulted in litigation by Benesco, Inc. against Bendyne Ltd.

## Supplemental Affidavit of Benjamin Dinerstein

- 3. I am not now nor have I ever been an officer, director or stockholder, or interested in any way in Benesco, Inc. and have had no contact with that organization since 1968.
- 4. With respect to automobile expenses, my 1962 automobile has been used constantly by me in connection with the business of Bendyne Ltd. for travel to and from appointments with customers and suppliers, and for delivering or picking up merchandise and supplies within the New York metropolitan area. No vehicles are or have been owned or leased by Bendyne Ltd. and my automobile is the only vehicle used in the business of Bendyne Ltd. Under the circumstances, I believe it is all-together fitting and proper that the expenses for the operation of the automobile and its parking be borne by Bendyne Ltd. Surely, the amounts of such payments, if ultimately found to be improper do not justify the drastic remedy of the appointment of a keceiver.
- 5. I respectfully submit that the automobile expense item is the only on-going activity to which plaintiffs object. All of the remaining allegations set forth in the affidavits submitted by plaintiffs' counsel deal with prior practices and dealings which have been terminated for many years. For example, C-B Sales Co. has been liquidated for over two and a half years and Bendyne Ltd. has been operated separately and independently.
- 6. Plaintiffs would seek to have this Court ignore the fact that as of January 12, 1971, I had made personal loans to Bendyne Ltd. in the sum of \$26,500 against which payments for rent for part of 1971 and part of 1972 should clearly be offset, resulting in a reduction of the amount due from Bendyne Ltd. in connection with my loans.
- 7. As noted above, except for the payment of automobile expenses, plaintiffs have wholly failed to in any way

## Supplemental Affidavit of Benjamin Dinerstein

establish any diminution of the assets of Bendyne Ltd. and any diversion of income due to Bendyne Ltd. On the contrary, I believe I have demonstrated to the Court in the Responses to plaintiffs' interrogatories and in my prior affidavits in opposition to this motion that all efforts are being made to enhance the position of Bendyne Ltd. and to successfully assert claims against third parties. It must be clear to the Court that plaintiffs' request for the appointment of a Receiver of Bendyne Ltd. will have tragic consequences to its business, and is primarily designed to cause the elimination of Bendyne Ltd. as competition to the sale of "Mavala Scientifique."

8. I therefore respectfully urge that since the parties herein are unable to agree on the amounts, if any, due to Mavala, Inc., this Court follow the mandate of Judge Solomon's interlocutory judgment dated January 4, 1972, and that a Special Master be appointed as directed in said judgment.

Wherefore, I respectfully submit that plaintiffs' motion should be in all respects denied.

Benjamin Dinerstein

(Sworn to October 18, 1973.)

## Order of Judge Gagliardi Appointing Receiver of Defendant Bendyne, Ltd.

#### UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

This cause having come to be heard on plaintiffs' motion for an order pursuant to Rule 65 of the Federal Rules of Civil Procedure, directing the appointment of a receiver for defendant Bendyne, Ltd., in aid of effectuation of plaintiffs' interlocutory judgment and pending entry of final judgment in this action, and pursuant to Rule 37(a) and (d) of the Federal Rules of Civil Procedure, compelling defendants to answer the written interrogatories propounded by plaintiffs on March 14, 1973, together with the reasonable expenses, including attorneys fees, incurred with respect to the latter portion of the motion; and the plaintiffs having submitted the affidavit of Michael C. Silberberg, Esq., verified the 5th day of June, 1973 and the exhibits attached thereto in support of said motion: and the defendants having submitted the affidavit of C. Benjamin Dinerstein, verified the 6th day of July, 1973, in opposition to said motion; and the Court on July 31, 1973 having heard Leonard W. Wagman of Golenbock and Barell, attorneys for the plaintiffs in support of said motion and Michael Stanton of Weil, Gotshal and Manges in opposition to the motion, and the Court having, by order dated August 10, 1973 ordered defendants C. Benjamin Dinerstein and Bendyne, Ltd. to serve and file answers to the interrogatories by August 14, 1973 and defendants having propounded answers to the interrogatories on August 13, 1973; and plaintiffs thereafter in further support of a motion to appoint a receiver, having submitted the affidavit of Michael

## Order of Judge Gagliardi Appointing Receiver

C. Silberberg, Esq. verified the 9th day of September, 1973; and defendants having submitted the affidavit of C. Benjamin Dinerstein, verified the 19th day of September, 1973 in opposition to said motion; and the plaintiffs have submitted the reply affidavit of Michael C. Silberberg, Esq. verified the 1st day of October, 1973 in further support of the motion and the defendants having submitted the supplemental affidavit of C. Benjamin Dinerstein verified the 18th day of October, 1973 in further opposition to the motion: and the Court on October 16, 1973 having heard Leonard W. Wagman of Golenbock and Barell, attorneys for plaintiffs in support of said motion and Michael Stanton of Weil. Gotshal and Manges in opposition to the motion; and it appearing that the immediate appointment of a receiver for defendant Bendyne, Ltd. is necessary to the effectuation of the interlocutory judgment in this action dated January 4, 1972 so as to prevent the complete and total frustration of the interlocutory judgment and prevent the continued dissipation and diversion of the income and profits from the sale of "Living Nail"; it is

Ordered that Otto C. Jaeger, 199 Main Street, White Plains, N. Y. be and he hereby is appointed receiver of the defendant, Bendyne, Ltd. and of all the properties of the said defendant, real and personal, of whatever kind and description located within the jurisdiction of this Court; and it is

Ordered that the said receiver forthwith file with the clerk of this Court a bond in the sum of \$250.00 with sureties to be approved by the court, conditioned that he will well and truly perform the duties of his office and duly account for all moneys and properties which may come into his hands and abide by and perform all things which he shall be directed to do; and it is

## Order of Judge Gagliardi Appointing Receiver

Ordered that until the further order of this court the said receiver be and he hereby is authorized forthwith to take and have complete and exclusive control, possession and custody of all the assets and property of the defendant located within the jurisdiction of this Court; and it is

Order that the said defendant and any persons acting under its direction shall upon presentation of a certified copy of this order deliver to the receiver any and all properties of the defendant, real or personal, in their possession or under their control; and that all persons are enjoined from in any way disturbing the possession of the receiver and from prosecuting any actions which affect the property of said defendant; and it is

Ordered that the said receiver be and he hereby is authorized to continue, manage and operate the business of the defendant, until the full order of this court, with full authority to carry on, manage and operate the said business, to buy and sell merchandise, supplies or stock in trade for cash or on credit and as may be deemed advisable by such receiver; and it is

Ordered that the said receiver be and he hereby is authorized in his discretion to employ such managers, agents, employees, servants, accountants, and attorneys as may in his judgment be advisable or necessary in the management, conduct, control or custody of the affairs of the defendant and of the assets thereof, and that said receiver be and he hereby is authorized to make such payments and disbursements as may be needful and proper for the preservation of the properties of the defendant, including the authority to make payments of debts entitled to priority; and it is

Ordered that said receiver be and he hereby is authorized to receive and collect any and all sums of money

## Order of Judge Gagliardi Appointing Receiver

due or owing to the defendant in any manner whatsoever, whether the same are now due or shall hereafter become due and payable, and said receiver be and he hereby is authorized to do such things and enter into such agreements in connection with the management, care and preservation of the properties of the defendant as he may deem advisable, and is authorized to incur such expenses and make such disbursements as may in his judgment be advisable or necessary in connection with the care, preservation and maintenance of the said properties; and it is

Ordered that the said receiver be and he hereby is authorized to institute, prosecute and defend, compromise, adjust, intervene in or become party to such actions or proceedings in state or federal courts as may in his opinion be necessary or proper for the protection, maintenance and preservation of the assets of the defendant or the carrying out of the terms of this order, and likewise to defend, compromise or adjust or otherwise dispose of any or all actions or proceedings instituted against him as receiver or against the defendant and also to appear in and conduct the defense or any suit or adjust or compromise any actions or proceedings now pending in any court by or against the defendant where such prosecution, defense or other disposition of such actions or proceedings will in the judgment of the said receiver be advisable or proper for the protection of the properties of the defendant.

Dated: New York, New York March 13, 1974.

> L. P. Gagliardi U.S.D.J.

## Notice of Appeal Dated March 18, 1974

#### UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

SIRS:

Notice Is Hereby Given that C. Benjamin Dinerstein and Bendyne, Ltd., two of the defendants above-named hereby appeal to the United States Court of Appeals for the Second Circuit from the Order of the Honorable Lee P. Gagliardi, United States District Court, appointing a receiver of Bendyne, Ltd., which said Order was executed on the 13th day of March, 1974, and filed with the Clerk of the Court on March 14th, 1974.

Dated: March 18, 1974

Weil, Gotshal & Manges

By Michael K. Stanton

Michael K. Stanton A Member of the Firm Attorneys for Defendants 767 Fifth Avenue New York, New York 10022 Tel. No. 212-758-7800

To:

Clerk of the United States
District Court
Southern District of New York
Foley Square
New York, New York 10007

Golenbock and Barell, Esqs.
Attorneys for Plaintiffs
60 East 42nd Street
New York, New York 10017
Tel. No. 212-986-3300

U.S. District Court Filed March 19 1974 S.D. of N.Y.

## Letter from Leonard W. Wagman to Judge Gagliardi Dated March 22, 1974

[LETTERHEAD OF]

GOLENBOCK AND BARELL 60 East 42nd Street New York, N.Y. 10017

March 22, 1974

Hon. Lee P. Gagliardi United States District Court Southern District of New York Foley Square New York, New York

Re: Tinsley v. Mavala

Dear Judge Gagliardi:

We are writing with respect to the order of this Court, dated March 13, 1974, which grants our motion for the appointment of a Receiver for Bendyne, Ltd. and appoints the Honorable Otto C. Jaeger the Receiver for Bendyne, Ltd.

Judge Jaeger has consulted with us concerning the substantial undertaking in terms of time and energy that is initially required of the Receiver of Bendyne, Ltd., and in view of Judge Jaeger's determination that his other responsibilities would inhibit the proper performance of his duties as Receiver, we are constrained to request that the Court amend its order of March 13, 1974 by appointing a new Receiver.

As a result of our conversations with Judge Jaeger and because of the nature of this matter, we would also request that the Receiver be permitted to retain an attorney and/or accountant as the Receiver deems necessary, and that your

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## Letter from Leonard W. Wagman

amended order so provide. The tasks required of the Receiver in taking over the management of Bendyne, Ltd., and in tracing the assets which have been dissipated and diverted over the years will necessitate the services of an attorney and/or accountant.

We are very concerned with this unanticipated delay, and respectfully urge the Court to act immediately to appoint a new Receiver.

## Respectfully yours,

Leonard W. Wagman

LWW:gal

Hand Delivery

cc: Michael K. Stanton, Esq.

## Letter from Andrea Hyde to Eric Nelson, Clerk to Judge Gagliardi Dated April 18, 1974

April 18, 1974

Eric Nelson, Esq.
Law Clerk to Judge Lee P. Gagliardi
United States District Court
Southern District of New York
Foley Square
New York, New York

Re: Tinsley v. Mavala

Dear Eric:

In accordance with our telephone conversation of today, and pursuant to our letter of March 22, 1974 (a copy of which is enclosed herewith), I am enclosing a proposed order for the appointment of a new receiver for defendant Bendyne, Ltd.

This proposed order is in all respects the same as the order of March 13, 1974 (a copy of which is also enclosed) appointing Otto C. Jaeger as receiver for Bendyne, Ltd. Thus, the only judicial action required is the selection of a new receiver.

It is at your suggestion that we are submitting this proposed order, in the hopes that it will expedite the appointment of a new receiver. We are most concerned with the prejudice resulting to our client from the delay and cannot overemphasize the need for the immediate select; n of a new receiver.

Thank you for your prompt cooperation and consideration in this matter.

Sincerely,

Andrea Hyde

AH:skk

Enclosure

cc: Hon. Otto C. Jaeger Michael K. Stanton, Esq.

## Letter from Michael C. Silberberg to Judge Gagliardi Dated August 2, 1974

[LETTERHEAD OF]

## GOLENBOCK AND BARELL 60 East 42nd Street New York, N. Y. 10017

August 2, 1974

Honorable Lee P. Gagliardi United States District Court Southern District of New York Foley Square New York, New York 10007

Re: Tinsley v. Mavala

Dear Judge Gagliardi:

At the conclusion of our recent conference in connection with the appointment of a substitute receiver for defendant Bendyne, Ltd., we requested and were afforded, the opportunity to reconstruct our amended order for appointment of a receiver to defendant Bendyne, Ltd. so as to limit the receiver's powers to accomplish only that which is necessary to the effectuation of plaintiffs interlocutory judgment. We are enclosing herewith that proposed order.

We delayed in submitting this reconstructed order in the hopes that during the interim, our accountants would be permitted by defendant to analyze and review the books and records of Bendyne, Ltd. so that at long last we might be in a position to calculate the monetary value of plaintiff's one-half interest in the profits of "Living Nail."

Notwithstanding Mr. Stanton's repeated offers of full cooperation and disclosure, the books and records essential to even the most preliminary of analysis have not been furnished. We have repeatedly requested production, by letter and by telephone, and our accountants who have been prepared to begin their review since July 2, 1974, have been

## Letter from Michael C. Silberberg

"orced to cancel tentatively scheduled appointments because of defendant's non-production of the requisite material.

While we still believe the appointment of a receiver with full powers is appropriate and necessary under the circumstances, we submit that the proposed order for a receiver with limited powers will go far towards the protection of our client's interests and will seek to curtail the abuses which were outlined in the affidavits upon which you originally granted our motion for the appointment of a receiver. Thus, the order provides that the receiver is to (i) take charge of the books and records of the corporation; (ii) supervise the making of entries therein; (iii) prepare reports to the Court which will finally provide us with information as to the amount of Bendyne's sales, the nature of its transactions with defendant Dinerstein and his other corporations and the amount of net profit from the sale of "Living Nail"; and (iv) establish a procedure by which the receiver can immediately move to halt diversion of assets from defendant Bendyne. We believe that the order harmonizes the Court's desire to adequately protect plaintiff Tinsley's interest in the net profits of defendant Bendyne, Ltd. while at the same time permitting the business to function free of and outside control.

We respectfully urge that the Court sign the enclosed order at the earliest possible time.

Very truly yours,

Michael C. Silberberg

MCS:jk

cc: Michael Stanton, Esq.

Enclosure

## Letter from Michael K. Stanton to Judge Gagliardi Dated August 8, 1974

W., G. & M.

August 8, 1974

Honorable Lee P. C. liardi United States District Court Southern District of New York Foley Square New York, New York 10007

Re: Tinsley v. Mavala

Dear Judge Gagliardi:

I learned by contacting my office yesterday that Michael C. Silberberg, Esq. had directed a letter to your Honor dated August 2, 1974 enclosing an amended proposed order for the appointment of a Receiver for Bendyne Ltd. Mr. Silberberg's letter apparently crossed in the mail with my letter to his associate Andrea Hyde, dated August 2, 1974, advising her of the availability of the books and records which have been the subject of my discussions with her.

Subsequent to our conference in your Chambers, Miss Hyde requested that certain specific books and records be made available on 48 hours' notice. We were unable to assemble these documents within 48 hours but did, over the July 4th weekend, procure the specific documents which she had requested and had them at my office available for examination by plaintiffs' accountants on July 8, 1974. On that date Miss Hyde advised me that due to either a misunderstanding between her and the accountants or a change of position by the accountants, that the documents which she had requested be produced were not sufficient for the accountants' purposes. Accordingly, at plaintiffs' request, the examination which was to start on July 8, 1974 of the documents then in my possession, was postponed.

Miss Hyde then advised me that the accountants would supply her with a schedule of specific new documents which

## Letter from Michael K. Stanton

they wished to examine, including some of the current records of Bendyne Ltd. I advised Miss Hyde that some of the current records were in the possession of the accountants and that if she would detail what was wanted, we would gather the material.

On August 2, 1974 I wrote the enclosed letter to her advising her of the status of the collection of these documents. From Mr. Silberberg's letter of August 2, 1974 it would appear that this information was either not made available to him or he was unaware of my dealings with Miss Hyde.

As we have indicated to the Court, the business of Bendyne Ltd. has been profitable and we are certain that the appointment of a Receiver will completely reverse this profitable trend and result in the destruction of the business. Obviously this is not in the interest of either the plaintiffs or Bendyne Ltd. Accordingly, we respectfully request that the proposed amended order which has been submitted to your Honor not be signed or, in the alternative, the Court refrain from considering the proposed order until plaintiffs' accountants have completed their examination and presented a report to plaintiffs' counsel. In the further alternative we feel, as did Judge Solomon, that the question of the determination of the net profits of Bendyne Ltd. be referred to a Special Master as provided in Judge Solomon's order.

Respectfully yours,

Michael K. Stanton For Weil, Gotshal & Manges

MKS:GLT Cc. Michael C. Silberberg, Esq. Bc. Edward Brodsky, Esq.

## Letter from Andrea Hyde to Judge Gagliardi Dated August 9, 1974

[LETTERHEAD OF]

GOLENBOCK AND BARELL 60 East 42nd Street New York, N.Y. 10017

BY HAND

August 9, 1974

Honorable Lee P. Gagliardi United States District Court Southern District of New York Foley Square New York, New York 10007

Re: Tinsley v. Mavala

Dear Judge Gagliardi:

I am in receipt of a letter to your Honor dated August 8, 1974, submitted in connection with the above action by Michael K. Stanton, attorney for defendants Dinerstein and Bendyne Ltd. Your law secretary, Mr. Nelson, was kind enough to afford us the opportunity to comment upon that letter in advance of any decision by the Court on our proposed order appointing a substitute receiver for Bendyne, Ltd.

As your Honor will note upon review of the provisions of the proposed order, and as Mr. Stanton would have noted had he read the proposed order before objecting to it, the order conforms precisely with the standards enunciated by your Honor at our conference of June 28, 1974 and is a substantial accommodation to Mr. Stanton's client. Thus, the proposed order limits the powers of the receiver, scrupulously avoiding interference with the corporation's operations. It represents a major compromise on our part, made only at the strong suggestion of your Honor.

## Letter from Andrea Hyde

Mr. Stanton's letter is misleading at best, and more significantly, focuses on a peripheral matter which is not relevant to the proposed order. In the first instance, my attempts to accommodate Mr. Stanton by seeking voluntary products on of the books and records for inspection by our accounts have no bearing on the question of whether a receiver should be appointed. Secondly, my attempts to arrange for accountants' review were frustrated by Mr. Stanton, who after numerous phone calls from me finally responded to my annexed letter of July 10th by the incomplete and wholly unsatisfactory response contained in his letter dated August 2nd, again promising that production would "soon be" forthcoming.

Additionally, the position re-iterated in Mr. Stanton's letter has been advanced and rejected by your Honor at two separate conferences on this matter.

In sum, the matters discussed in Mr. Stanton's letter should have no affect on your Honor's decision. Accord-

should have no affect on your Honor's decision. Accordingly, we urge the Court to act promptly and sign the proposed order lest our client be utterly without protection.

Respectfully submitted,

Andrea Hyde

AH:sh Enc.

cc: Michael K. Stanton, Esq.

## Letter Attached to Letter of August 9, 1974 Dated July 9, 1974

July 9, 1974

Michael K. Stanton, Esq. Weil, Gotshal & Manges 767 Fifth Avenue New York, New York 10022

Re: Tinsley v. Mavala

Dear Mike:

Earlier today arrangements were made for our accountants to begin their review of the books and records relating to the operations of Bendyne, Ltd. at your offices this afternoon. We were forced to postpone that inspection, however, when our accountants reviewed your letter of July 5, 1974 and advised me that the records listed in that letter provide an insufficient starting point for even the most preliminary of analyses.

To make any intelligent evaluation of the current operations of Bendyne, Ltd. our accountants require the initial production of the following books and records of Bendyne, Ltd.:

General Journals for the period 1972 to date;

General Ledgers for the period 1972 to date;

Purchase Books, together with Purchase Invoices, for the period 1972 to date;

Cash Receipts and Cash disbursements books, together with supporting documents, for the period 1972 to date;

Sales invoices and Sales Journals for the period 1972 to date;

## Letter Attached to Letter of August 9, 1974

Subsidiary Accounts Receivable Ledger and Subsidiary Accounts Payable Ledger for the period 1972 to date;

Any and all financial statements prepared during the period 1972 to date, including accountants reports, balance sheets, income statements;

Tax Returns for the years 1972 and 1973 and 1974 if available;

Bank Statements and cancelled checks for the years 1972 to date.

Additionally, simultaneous production of the same books and records for Bendyne Products Inc. and for Bendol, Inc. and for any other company related through Dinerstein is essential to a proper evaluation of the information contained in Bendyne Ltd.'s books.

We understand the problem with respect to production of the books and records of C B Sales Co., currently under the control of a receiver, so those records need not be produced in the first instance.

Please advise me, as promptly as possible, of the earliest date for production of the above so we can confirm a schedule with our accountants.

Thank you.

Sincerely,

Andrea Hyde

AH:skk BY HAND

bce: Leonard W. Wagman

## Amended Order of Judge Gagliardi Appointing Receiver of Defendant Bendyne, Ltd. Entered August 29, 1974

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

This cause having come on to be heard on plaintiffs' motion for an order pursuant to Rule 66 of the Federal Rules of Civil Procedure, directing the appointment of a receiver for defendant Bendyne, Ltd., in aid of effectuation of plaintiffs' interlocutory judgment and pending entry of final judgment in this action, and pursuant to Rule 37(a) and (d) of the Federal Rules of Civil Procedure, compelling defendants to answer the written interrogatories propounded by plaintiffs on March 14, 1973, together with the reasonable expenses, including attorneys fees, incurred with respect to the latter portion of the motion; and the plaintiffs having submitted the affidavit of Michael C. Silberberg, Esq., verified the 5th day of June, 1973 and the exhibits attached thereto in support of said motion; and the defendants having submitted the affidavit of C. Benjamin Dinerstein, verified the 6th day of July, 1973, in opposition to said motion; and the Court on July 31, 1973 having heard Leonard W. Wagman of Golenbock and Barell, attorneys for the plaintiffs in support of said motion and Michael Stanton of Weil, Gotshal and Manges in opposition to the motion, and the Court having, by order dated August 10, 1973 ordered defendants C. Benjamin Dinerstein and Bendyne, Ltd. to serve and file answers to the interrogatories by August 14, 1973 and defendants having propounded answers to the interrogatories on August 13, 1973;

and plaintiffs thereafter in further support of a motion to appoint a receiver, having submitted the affidavit of Michael C. Silberberg, Esq. verified the 9th day of September, 1973; and defendants having submitted the affidavit of C. Benjamin Dinerstein, verified the 19th day of September, 1973 in opposition to said motion; and the plaintiffs having submitted the reply affidavit of Michael C. Silberberg, Esq. verified the 1st day of October, 1973 in further support of the motion and the defendants having submitted the supplemental affidavit of C. Benjamin Dinerstein verified the 18th day of October, 1973 in further opposition to the motion; and the Court on October 16, 1973 having heard Leonard W. Wagman of Golenbock and Barell, attorneys for plaintiffs in support of said motion and Michael Stanton of Weil, Gotshal and Manges in opposition to the motion; and it appearing that the immediate appointment of a receiver for defendant Bendyne, Ltd. with limited powers is necessary to the effectuation of the interlocutory judgment in this action dated January 4, 1972 so as to preven, the complete and total frustration of the interlocutory judgment and the continued dissipation and diversion of the income and profits from the sale of "Living Nail" and to protect plaintiffs one-half interest in the income and profits from the sale of "Living Nail" by ensuring the maintenance of accurate financial records; and an order of this Court having been entered on March 14, 1974 appointing Otto C. Jaeger receiver for Bendyne, Ltd., and it appearing that said Otto C. Jaeger is unable to serve as such receiver and that the appointment of a new receiver for Bendyne, Ltd., with limited powers is required; it is

Ordered the order of this Court entered March 14, 1974, which order appoints Otto C. Jaeger Receiver for Bendyne, Ltd. be and is hereby withdrawn; and it is

Ordered that Michael Devine, Jr., 230 Park Avenue, N.Y., N.Y. be and he hereby is appointed receiver of the

defendant, Bendyne, Ltd. to the extent and with the limited powers necessary to supervise and ensure the maintenance of accurate books and records of the corporation and the preparation of reports to the Court as more particularly provided below; and it is

Ordered that the said receiver forthwith file with the clerk of this Court a bond in the sum of \$250, with sureties to be approved by the Court, conditioned that he will well and truly perform the duties of his office and duly account for all properties which may come into his hands and abide by and perform all things which he shall be directed to do; and it is

Ordered that until the further order of this Court the said receiver be and he hereby is authorized forthwith to take and have complete and exclusive control, possession and custody of all the books and records and underlying documents of the defendant Bendyne, Ltd. including but not limited to general journals, general ledgers, purchase books, together with purchase invoices, cash receipts and cash disbursements, sales journals and sales invoices, subsidiary accounts receivable ledger and subsidiary accounts payable ledger, all financial statements and tax returns, check books, bank statements and cancelled checks and all documents underlying the entries in all of the above books and records since the date of its incorporation (the "books and records"); and is empowered to do all that is necessary to ensure that the books and records are maintained so as to accurately reflect all income and expenses of defendant Bendyne, Ltd. since the date of its incorporation; and it is

Ordered that the defendants and any persons acting under their direction shall upon presentation of a certified copy of this order deliver the books and records to the

receiver; and are enjoined from in any way disturbing the possession of the receiver and from prosecuting any actions which affect the possession of said receiver; and it is

Ordered that defendant C. Benjamin Dinerstein, and any persons acting under his direction, shall make available to the receiver at his request any and all books and records and underlying documents of any and all corporations and companies in which he holds or has held a thirty percent (30%) interest at any time since Bendyne, Ltd.'s incorporation, and it is

Ordered that the said receiver be and he hereby is authorized to continue to obtain and retain complete control of the books, records and underlying documents of the defendant and to supervise the making of entries therein until further order of the Court and to employ in his discretion such agents, employees, accountants and attorneys as may in his judgment be advisable and necessary in the supervision of the books and records and in the preparation of the reports specified below; and it is

Ordered that the receiver prepare or cause to be prepared under his supervision reports to the Court and to the parties as follows:

(a) A report to be filed not later than January 1, 1975 setting forth for each year since the incorporation of defendant Bendyne, Ltd. (i) the amount of its net sales; (ii) the cost of goods sold; (iii) the amount of gross profit; (iv) the amount and nature of expenses incurred; (v) the amount of net profit; and (vi) a description of all transactions between defendant Bendyne, Ltd. and defendant Dinerstein and/or any other corporation in which he has a 30% interest; and

(b) Until further order of the Court, a report to be filed within 15 days after the last day of the end of each month commencing November 1, 1974 setting forth for the preceding month (i) the total amount and an itemization of all sales; (ii) cost of goods sold; (iii) the amount of gross profit; (iv) the amount and nature of expenses incurred; (v) the amount of net profit; and (vi) a description of all transactions between defendant Bendyne, Ltd. and defendant Dinerstein and/or any other corporation in which he has a 30% interest; and it is

Ordered that should the receiver at any time conclude that any assets of defendant Bendyne, Ltd. are being diverted to the personal benefit of defendant Dinerstein or to any corporation in which he has an interest, he shall immediately invoke the following procedure:

- (a) He shall serve written notice upon each of the parties to this action setting forth the facts concerning the diversion and demand that the diversion cease and the assets be restored to the corporation;
- (b) Should defendant fail to comply with the demands of the receiver as set forth in the letter within 10 days of the date of the letter he shall, within 5 days thereafter, convene a meeting of each of the parties of the action and their attorneys for the purposes of attempting to resolve the matter; and
- (c) If the matter is not satisfactor by resolved in the judgment of the receiver, he shall thereafter apply to the Court for such order as is necessary to protect the financial integrity of the corporation and/or the plaintiff Tinsley's 50% interest in the profits of "Living Nail".

Nothing hereinabove shall affect the right of the receiver and/or the plaintiffs to apply to the Court at any time for

such orders which are necessary to protect the financial integrity of the defendant Bendyne, Ltd. and/or plaintiff Tinsley's 50% interest in the profits from "Living Nail", and it is

Ordered that the receiver be and he hereby is authorized to do such things and enter into such agreements in connection with the management, care and preservation of the books, records and underlying documents of the defendant and the preparation of the foregoing reports as he may deem advisable, and is authorized to incur such expenses and make such disbursements as may in his judgment be advisable or necessary in connection with the care, preservation and maintenance of the said books, records and underlying documents and preparation of the foregoing reports.

Dated: New York, New York July 31, 1974.

> Lee P. Gagliardi U.S.D.J.

[Seal]

A True Copy

Raymond F. Burghardt, Clerk By: E. A. Becker, Deputy Clerk

## Notice of Appeal Dated September 10, 1974

# UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

SIRS:

Notice Is Hereby Given that C. Benjamin Dinerstein and Bendyne, Ltd., two of the defendants above-named, hereby appeal to the United States Court of Appeals for the Second Circuit from the Order of the Honorable Lee P. Gagliardi, United States District Court, appointing a Receiver of Bendyne, Ltd., which said order was dated as of July 31, 1974 and, upon information and belief, executed on or about August 28, 1974 and filed with the Clerk of the Court on August 29, 1974, and served on the defendants Bendyne, Ltd. and C. Benjamin Dinerstein on September 4, 1974.

Dated: September 9, 1974 New York, New York

Weil, Gotshal & Manges

By Michael K. Stanton

Michael K. Stanton, A Member of the Firm Attorneys for Defendants 767 Fifth Avenue New York, New York 10022 Telephone No.: 212-758-7800

## Notice of Appeal

To:

Clerk of the United States District Court, Southern District of New York Foley Square New York, New York 10007

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